SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Snowdon*, 2016 NSSC 278

Date: 20160922
Docket: CRAM 437262
Registry: Amherst

Between:

Michael John Snowdon

Applicant

v.

Her Majesty The Queen

Respondent

Decision
Voir Dire

Judge:	The Honourable Justice Jeffrey R. Hunt
Heard:	February 24 and June 10, 2016 in Amherst, Nova Scotia
Final Written Submissions:	July 23, 2016
Oral Decision:	September 22, 2016, in Amherst, N.S.
Written Release:	October 19, 2016
Counsel:	Monica G. McQueen and Catherine Hirbour, for the Federal Crown Paul Drysdale, for the Provincial Crown Stephanie Hillson, for the Defendant

Indictment # 1 – March 23, 2015

Charges:

THAT HE on or about the 15th day of February, 2013, at or near Amherst, in the County of Cumberland, Province of Nova Scotia:

Count #1 Did possess a firearm, to wit: A Cooey model 840 shotgun, knowing that he was not the holder of a license under which he may possess it, contrary to Section 92(3)(a) of the ***Criminal Code***;

AND FURTHERMORE at the same time and place aforesaid,

Count #2 Did possess a firearm to wit: A Winchester 308 model 100 rifle, knowing that he was not the holder of a license under which he may possess it, contrary to Section 92(3)(a) of the ***Criminal Code***;

AND FURTHERMORE at the same time and place aforesaid,

Count #3 Did possess a firearm, to wit: A Remington model 788 rifle, knowing that he was not the holder of a license under which he may possess it, contrary to Section 92(3)(a) of the ***Criminal Code;***

AND FURTHERMORE at the same time and place aforesaid,

Count #4 Did possess a firearm, to wit: A Weatherby Vanguard 30-06 rifle, knowing that he was not the holder of a license under which he may possess it, contrary to Section 92(3)(a) of the ***Criminal Code***;

AND FURTHERMORE at the same time and place aforesaid,

Count #5 Did possess a firearm, to wit: A CIL model 171 .22 calibre rifle, knowing that he was not the holder of a license under which he may possess it, contrary to Section 92(3)(a) of the ***Criminal Code;***

AND FURTHERMORE at the same time and place aforesaid,

Count #6 Did possess a firearm to wit: A Cooey model 840 shotgun, without being the holder of a license under which he may possess it, contrary to Section 91(3)of the ***Criminal Code***;

AND FURTHERMORE at the same time and place aforesaid,

Count #7 Did possess a firearm, to wit: Winchester 308 model 100 rifle, without being the holder of a license under which he may possess it, contrary to Section 91(3) of the ***Criminal Code***;

AND FURTHERMORE at the same time and place aforesaid,

Count #8 Did possess a firearm, to wit: A Remington model 788 rifle, without being the holder of a licence under which he may possess it, contrary to Section 91(3) of the ***Criminal Code;***

AND FURTHERMORE at the same time and place aforesaid,

Count #9 Did possess a firearm, to wit: A Weatherby Vanguard 30 06 Rifle, without being the holder of a license under which he may possess it, contrary to Section 91(3) of the ***Criminal Code;***

AND FURTHERMORE at the same time and place aforesaid,

Count #10 Did possess a firearm to wit: a CIL model 171 .22 calibre rifle, without being the holder of a license under which he may possess it, contrary to Section 91(3) of the ***Criminal Code***;

AND FURTHERMORE at the same time and place aforesaid,

Count #11 Did unsafely store a CIL model 171 .22 calibre rifle, thereby contravening Regulation 5(1)(a) of the ***Storage, Display,***

Transportation and Handling of Firearms by Individuals Regulations, contrary to Section 86(2) of the ***Criminal Code***;

AND FURTHERMORE at the same time and place aforesaid,

Count #12 Did unsafely store a Cooey model 840 shotgun, thereby contravening Regulation 5(1)(a) of the ***Storage, Display, Transportation and Handling of Firearms by Individuals Regulations***, contrary to Section 86(2) of the ***Criminal Code.***

Indictment #2 – May 1, 2015

Charges:

Count #1 **THAT** on or about the 15th day of February, 2013 at or near Amherst, Nova Scotia, did possess a substance included in Schedule 1 to wit: hydromorphone for the purpose of trafficking contrary to Section 5(2) of the ***Controlled Drugs and Substances Act.***

Count #2 **AND FURTHERMORE** on or about the 15th day of February, 2013 at or near Maccan, in the Province of Nova Scotia, did traffic in a substances included in Schedule 1 to wit: hydromorphone, contrary to Section 5(1) of the ***Controlled Drugs and Substances Act***

CONTENTS

By the Court:

OPENING REMARKS

[1] As previously discussed, it is my intention today to render an oral decision. Any written version would be edited only for grammar or readability.

[2] The Applicant, Michael Snowdon alleges certain violations of his Section 8 and 9 rights pursuant to the ***Canadian Charter of Rights and Freedoms***. Suggestions of Section 7 and 10 violations were withdrawn in written submissions by the Defence.

INTRODUCTION

[3] The police received source information which indicated Mr. Snowdon was trafficking in his own prescription opiates. Using what they arguably believed was the standard procedure they sought and received certain information and confirmations from the Prescription Monitoring Program of Nova Scotia ("PMP"). It is this issue which sets this matter apart from a standard challenge to an Information to Obtain ("ITO") a search warrant. I use the term "standard" advisedly because every set of facts will obviously have its own unique features. The use of the PMP data is what distinguishes this matter from most others.

[4] The method by which the PMP data was obtained will be considered as this information was employed in formulating grounds for arrest and in the swearing of an Information to Obtain ("ITO") a search warrant which yielded items of real evidence including narcotics and weapons.

[5] To assist in moving through the issues, I will use what I would call a decision tree. This pathway is taken from the issues posed by each side in their written material and argument.

1. Did the obtaining of the Prescription Monitoring Program data constitute a search?
2. If so, was this conducted in violation of Mr. Snowdon's s.8 rights?
3. If so, how does this impact the grounds for arrest and the contents of the ITO?
4. If the ITO is redacted in any fashion, does the balance of the ITO still support its having been granted?
5. The Court will conduct a s. 24(2) analysis, either in the first instance or in the alternative, depending on the outcome of the previous questions.

[6] Mr. Snowdon is presently charged with offences in a multi count Indictment as follows:

> Indictment – March 23, 2015
>
> Count #1 Did possess a firearm, to wit: A Cooey model 840 shotgun, knowing that he was not the holder of a license under which he may possess it, contrary to Section 92(3)(a) of the ***Criminal Code***;

Count #2 Did possess a firearm to wit: A Winchester 308 model 100 rifle, knowing that he was not the holder of a license under which he may possess it, contrary to Section 92(3)(a) of the ***Criminal Code***;

Count #3 Did possess a firearm, to wit: A Remington model 788 rifle, knowing that he was not the holder of a license under which he may possess it, contrary to Section 92(3)(a) of the ***Criminal Code;***

Count #4 Did possess a firearm, to wit: A Weatherby Vanguard 30-06 rifle, knowing that he was not the holder of a license under which he may possess it, contrary to Section 92(3)(a) of the ***Criminal Code***;

Count #5 Did possess a firearm, to wit: A CIL model 171 .22 calibre rifle, knowing that he was not the holder of a license under which he may possess it, contrary to Section 92(3)(a) of the ***Criminal Code;***

Count #6 Did possess a firearm to wit: A Cooey model 840 shotgun, without being the holder of a license under which he may possess it, contrary to Section 91(3)of the ***Criminal Code***;

Count #7 Did possess a firearm, to wit: Winchester 308 model 100 rifle, without being the holder of a license under which he may possess it, contrary to Section 91(3) of the ***Criminal Code***;

Count #8 Did possess a firearm, to wit: A Remington model 788 rifle, without being the holder of a licence under which he may possess it, contrary to Section 91(3) of the ***Criminal Code;***

Count #9 Did possess a firearm, to wit: A Weatherby Vanguard 30 06 Rifle, without being the holder of a license under which he may possess it, contrary to Section 91(3) of the ***Criminal Code;***

Count #10 Did possess a firearm to wit: a CIL model 171 .22 calibre rifle, without being the holder of a license under which he may possess it, contrary to Section 91(3) of the ***Criminal Code***;

Count # 11 Did unsafely store a CIL model 171 .22 calibre rifle, thereby contravening Regulation 5(1)(a) of the ***Storage, Display, Transportation and Handling of Firearms by Individuals Regulations***, contrary to Section 86(2) of the ***Criminal Code***;

Count #12 Did unsafely store a Cooey model 840 shotgun, thereby contravening Regulation 5(1)(a) of the ***Storage, Display, Transportation and Handling of Firearms by Individuals Regulations***, contrary to Section 86(2) of the ***Criminal Code.***

Indictment – May 1, 2015

Count #1 **THAT** on or about the 15th day of February, 2013 at or near Amherst, Nova Scotia, did possess a substance included in Schedule 1 to wit: hydromorphone for the purpose of trafficking contrary to Section 5(2) of the ***Controlled Drugs and Substances Act.***

Count #2 **AND FURTHERMORE** on or about the 15th day of February, 2013 at or near Maccan, in the Province of Nova Scotia, did traffic in a substances included in Schedule 1 to wit: hydromorphone, contrary to Section 5(1) of the ***Controlled Drugs and Substances Act***

POSITIONS OF THE PARTIES

[7] The submission of the Defence is that the information obtained from the PMP was a search which was unconstitutional based on, among other things, the fact the process created by the PMP and employed by the Police was in violation of the terms of the Statute creating the PMP. The ***Prescription Monitoring Act*** S.N.S. 2004, c. 32 ("PMA") sets out a process for disclosure. We will consider

whether the process was followed and the consequences, if any, of failures to comply with the statute.

[8] The Defence further says that in the absence of the PMP information there were no reasonable grounds to justify the warrantless arrest and, subsequently, insufficient grounds to justify the issuance of the search warrant. Pursuant to s. 24(2) they seek exclusion of the evidence obtained during the arrest and by virtue of the search warrant. Additionally, there is an allegation of a s.9 breach - the grounds for arrest will be considered.

[9] The Crown takes the position that the information obtained from the PMP did not constitute a search. They argue that no reasonable expectation of privacy could attach to information of this nature collected in such a highly regulated sphere of activity. If it did constitute a search, they take the position it was not conducted in a manner which violated s.8. Alternatively, if it did violate s.8 the other grounds for belief held by the Officer and subsequently to ground the ITO are more than sufficient to support the grounds for arrest and the issuance of the ITO.

[10] Finally, the Crown asserts that notwithstanding any violation of the Charter, the good faith nature of any error respecting the use of the PMP data together with

the other factors in R. v. Grant ought not result in exclusion of the evidence after the balancing analysis required by S. 24(2).

BURDENS OF PROOF

[11] I do intend to canvass briefly a summary of the burdens of proof and law to be applied in this matter. I do this so that I might better keep these burdens in mind throughout the analysis of all the facts and issues on the *Voir Dire*.

[12] The Defendant seeks a ***Charter*** remedy. As the Applicant, he carries a burden on a balance of probabilities to demonstrate that his ***Charter*** rights have been infringed such that a s.24(2) remedy is warranted.

[13] When the question of lawful arrest is raised, the Crown has the burden of establishing a lawful arrest. The Crown acknowledges this must be on both objective and subjective grounds. If the Crown establishes a lawful arrest the Defence has the burden shift back to it on a balance of probabilities to prove a ***Charter*** breach regarding the search incident to arrest.

[14] Section 495(1)(a) of the ***Criminal Code*** permits an Officer to arrest without warrant a person who on reasonable grounds the Officer believes has committed or is about to commit an indictable offence.

[15] What constitutes “reasonable grounds to believe” within the meaning of s. 495(1)(a)? This law may be summarized as follows:

- The “reasonable grounds to believe” standard requires something more than mere suspicion. It is a standard of “reasonable probability”. The standard at this stage clearly is not that of proof beyond a reasonable doubt. The case law says that it is not proof of a prima facie case. Case law has called it reasonable belief. It encompasses a practical non-technical, common sense, assessment of the totality of the circumstances at the time the arrest decision is made.

- The arresting officer’s subjective belief that the requisite reasonable grounds exist is insufficient in and of itself. These grounds also must be justifiable on an objective analysis.

- Determining whether the arresting officer’s grounds were objectively reasonable involves an assessment of all the facts known at the time the arrest was effected. Whether other information, had it been available, would have strengthened or weakened the belief is not a relevant consideration.

- The weighing of whether objective grounds exist involves determining whether a reasonable person in the place of the officer with the same experience, training, knowledge and skills would have reached the same conclusion. If this is the determination then the grounds for arrest will be considered to have been objectively reasonable.

[16] With respect to the use of tips from sources, much case law direction has been developed. To the extent an investigation involves reliance on a tip, whether from an anonymous source or a confidential informant, courts will consider a

variety of factors, including the degree of detail provided; information as to the informant's source of knowledge; indicia of the informant's reliability including the ability to confirm the accuracy of any of the provided information ; past proven reliability can play a significant role in this weighing process. Strength in one area can, to some extent, compensate for weakness in another.

[17] The expertise and past experience of the arresting officer can never be an excuse for arbitrary arrest. The fact that incriminating evidence was found will not be used after the fact to bolster the justification for the officer's belief.

SUMMARY OF THE EVIDENCE

[18] In wish to turn to an overview of the evidence. This summary will not touch on every single element of the testimony, but I have weighed and considered all of the testimony, even if each element is not specifically referred to in this summary.

[19] There were a total of five witnesses called on the *Voir Dire*. These were three RCMP Officers and two representatives of the Nova Scotia Prescription Monitoring Program.

CONSTABLE MUNN

[20] Constable Jerrod Munn was called. Constable Munn was identified as the Officer who had drafted the ITO respecting the search warrant. Constable Munn indicated that the ITO before the Court contained all the source information of which he had been made aware at the time of preparation. With respect to the grounds on which he relied - much of this was supplied to him by Constable Vincent.

[21] Constable Munn agreed that with respect to the source of unknown reliability he was fairly limited in what he shared in the ITO with respect to past criminal record. The disclosure was limited to an absence of a record for perjury or obstruction. He indicated this was his usual practice. Similarly, he agreed no disclosure was made respecting whether the source of unknown reliability was paid or not. He indicated this was his practice with respect to sources of unknown reliability in an ongoing investigation.

[22] Constable Munn was asked about references in the ITO at paragraph 23 to information received from a pharmacist at Shoppers Drug Mart in Amherst. Constable Munn advised that this information came to him from Constable Galloway. In terms of any contact between Constable Munn and the PMP, he

advised that his only direct dealings in this matter was that subsequent to the arrest he faxed to them the notification or confirmation of charges against Michael Snowdon.

[23] The particular elements of the ITO will be referred to and reviewed in more detail later in these reasons.

CONSTABLE VINCENT

[24] Constable Paul Vincent was called. He was questioned about his contact with the Nova Scotia Prescription Monitoring Program. In evidence were the faxed request forms which Constable Vincent identified as being the full extent of the information forwarded by him to the PMP.

[25] Constable Vincent testified as follows:

- Commencing in December, 2012 and through February 15, 2013 Constable Vincent was the recipient of information from three sources with respect to the trafficking of opiates by the Defendant. The sources were not all similarly situated. Two of them had a history of past proven reliability. One was of unknown reliability. The three sources shared information which was generally consistent and its core was that Mr. Snowdon was filling legally prescribed prescriptions written for him but subsequently diverting part or all of the product to others.
- Constable Vincent was aware of the existence of the Prescription Monitoring Program and believed it would be of assistance in these circumstances. In early December, 2012 he filled out and submitted the “fill in the blank” PMP form which is in evidence. This was not successful in identifying any records. This was because the name and date of birth had to match exactly and there

was an error in the spelling of the defendant's last name. In late January Constable Vincent forwarded another request in the same form except with a corrected spelling. This resulted in the Prescription Monitoring Program identifying a party within their records who they believed was the proper subject of the request. The Prescription Monitoring Program did forward, in accordance with their practice, a record consisting of recent prescriptions for opiates filled by Mr. Snowdon.

- There was some surveillance conducted by the Police during this period. This served to confirm the residence of Mr. Snowdon.
- On review it appears that the information from the Prescription Monitoring Program consisted of the dates on which the Defendant (Applicant) would collect his hydromorphone pills using his script. The dates on review revealed a pattern of monthly prescriptions. The scripts were filled in a consistent pattern at the same pharmacy.
- Drawing on what he could discern from the records, Constable Vincent concluded that Mr. Snowdon would be receiving and filling a renewed prescription in about mid-February, 2013. On February 14, 2013 Constable Vincent made a renewed request to the Prescription Monitoring program and was advised there had been no new scripts filled since the prior report in January. Constable Vincent testified that notwithstanding the lack of new information from the Prescription Monitoring Program, a surveillance was organized for the pharmacy for the morning of February 15, 2013.

- No observations were made of Mr. Snowdon at the pharmacy that morning. He was observed at approximately 10:00 a.m. back at his residence at 58 Hickman. He was observed leaving the home and together with his spouse, driving to the residence of Kevin Dwyer in Maccan, Cumberland County. This was an individual Constable Vincent testified who he knew to be an abuser of prescription opiates. Constable Vincent also testified that he had previously received informant information that Dwyer was the recipient of prescription medications from Mr. Snowdon on a regular basis. That is to stay medications intended for Mr. Snowdon but diverted to Kevin Dwyer.

- Constable Vincent's evidence was that as the Snowdon vehicle went towards Maccan, Cumberland County, he commented to another officer that he believed the Dwyer residence would be the likely destination. This in fact did turn out to be the case.

- Snowdon and his spouse entered the residence and stayed for approximately 15 to 20 minutes. Constable Vincent had put a written request to the

> Prescription Monitoring Program the morning of February 15th. Once it was clear that Mr. Snowdon had visited the Dwyer home Constable Vincent called the offices of Prescription Monitoring Program asking for a telephone response to his faxed request of earlier that morning. He spoke to Lori Emery. He was given a verbal report which consisted of confirmation that Mr. Snowdon had earlier that morning filled a prescription for 60 tablets of 24 milligram hydromorphone and 60 tablets of 30 milligrams of hydromorphone.
>
> - Constable Vincent testified with respect to his prior contact with the Nova Scotia Prescription Monitoring Program. He described a history of making requests in the same manner as he did in this case. The request form came from PMP. He testified that he was told that this form was the "up-dated" form. He understood this was the form to be employed when police investigators were seeking monitored prescription histories.

[26] Constable Vincent was questioned extensively about the information he provided for inclusion in the ITO. A review of the ITO discloses that on January 26, 2012 a source known as Source B stated that Kevin Dwyer was selling dilaudid and hydromorphone in six milligram, 10 milligram and 12 milligram strengths. The information disclosed by Source B on August 1, 2012 indicated that Kevin Dwyer continued to sell a lot of pills, particularly dilaudid. Information that Michael Snowdon had previously been convicted of possession of dilaudid on March 5, 2012 was included in paragraph 11. Hearsay information disclosed by a source, known as Source A, on January 22, 2013, indicated that associates of Source A had told Source A that the guy living at 58 Hickman Street, Amherst, was selling prescription pills. Information from Source A on January 24, 2013 indicated that Mr. Snowdon had sold one "hydro 24 milligram" to a buyer within

the past 24 hours. Neither the basis for the sources' knowledge of the sale nor the manner in which Mr. Snowdon was identified was indicated.

[27] Information from a source of unknown reliability on January 22, 2013 indicated that:

1. Mike Snowdon lived at 58 Hickman Street;
2. That he sells hydro's for $40.00 per capsule;
3. He has a prescription for hydromorphone which he refills on a monthly basis;
4. He has hydromorphone to resell and that he lives in a yellow two storey house with the number 58 sprayed on the door.

[28] Information from the same source of unknown reliability on January 23, 2013 indicated that Mr. Snowdon recently sold hydromorphone and that an individual named Kevin Dwyer bought prescription medication from Mr. Snowdon for resale at a higher price. Neither the basis for the sources knowledge of these transactions nor the manner in which Mr. Snowdon and Mr. Dwyer were identified is clearly indicated.

[29] Additional information from the same source of unknown reliability dates to January 25, 2013. The source reported to have been in Mr. Snowdon's residence

within the past 24 hours and observed Mr. Snowdon sell four hydro 24's for $160.00. No description of the interior of the residence was provided.

[30] Surveillance was conducted on 58 Hickman Street, Amherst, on January 22, 2013. The duration was said to be approximately half an hour. One individual visited the residence for approximately two minutes. Surveillance conducted on Michael Snowdon on February 15, 2013 during which he travelled from his residence in a vehicle driven by his wife to a residence located at 245 Station Street, Macaan. As noted previously, the two parties were observed to remain in the residence for approximately 15 to 20 minutes.

[31] Constable Vincent was aware that the residence located at 245 Station Street belonged to Kevin Dwyer. Other information contained in the ITO will be referenced later in these reasons.

[32] Source A is a confidential informant handled by Constable Vincent. He was a source of past proven reliability. Some elements of the background were as follows:

- He had previously made approximately 110 separate past disclosures. These were not alleged to relate to 110 different individuals or instances of criminality.

- The information resulted in 12 different searches being conducted by Police.

- Vincent acknowledged two occasions where search warrants were executed and no narcotics were obtained. He testified that on these occasions other investigations satisfied him that the product had been in place but had been moved prior to the search.

- On approximately 12 occasions the search was positive for the substance identified by the source.

- Constable Vincent testified that in 10 years as an Officer he was involved in 24 to 36 hydromorphone trafficking investigations.

[33] Source B was also a source of past proven reliability. Constable Vincent testified that he had five years of approximately monthly contact with the source. He testified five search warrants for controlled drugs were executed as a result of information received from Source B. Each was positive for the seizure of narcotics.

[34] With respect to the source of unknown reliability, this was an individual who supplied information which will be reviewed when we examine the ITO in more detail. The source was clearly presented in the ITO as a person of unknown reliability.

[35] Constable Vincent described the arrest process and the search incident to arrest. He identified $810.00 in folded cash separated in a manner identified by him as being regimented. He also discovered the receipt for the hydromorphone picked up that morning by Mr. Snowdon.

CONSTABLE GALLOWAY

[36] Constable Jason Galloway also gave evidence at the hearing. Constable Galloway was part of the surveillance team on February 15, 2013. During the process of the arrest he largely dealt with Mr. Snowdon's spouse who was also in the vehicle. Constable Galloway testified that he had contact with persons associated with two pharmacies in Amherst. This was driven by an inquiry about whether certain pills which Mr. Snowdon told Constable Vincent he had consumed could be a danger to Snowdon's health. One of these was the pharmacist who had dispensed the prescriptions that morning to Mr. Snowdon. This pharmacist confirmed the filling of the prescription to Constable Galloway.

[37] Constable Galloway was questioned about a prior stop and arrest of Mr. Snowdon. The arrest was stated to be for suspicion of possession of narcotics. Constable Galloway acknowledged this stop and arrest and indicated no illegal narcotics were identified and no charges resulted. Mr. Snowdon was detained under arrest on that occasion for approximately two to three hours.

[38] Constable Galloway believed that Constable Munn was aware of this negative stop and search. He had no recollection of a discussion with Constable Munn regarding whether this event was something which ought to have been identified in the ITO.

PMP EMPLOYEES

[39] In addition to the Police witnesses, two employees of the Prescription Monitoring Program were called. These were the Program Manager, Kevin Lynch and Business Support Analyst, Brenda Hannam. Also in evidence by agreement was the evidence of a third employee of the program, Lori Emery. The evidence of Ms. Emery went in by way of an agreed Statement of Facts.

[40] Mr. Lynch testified that he had become Director of the PMP approximately six months prior to these events. He gave evidence on the background and

objectives of the legislation and Program. The process for disclosing information to law enforcement was explored in detail. The operative written policy in this regard was entered into evidence.

[41] Mr. Lynch testified that where a "standard request" from law enforcement was received, and it met the criteria, then staff members were authorized to release records. The stated criteria were:

1. A written request coming from law enforcement. Law enforcement will state the inquiry relates to an ongoing investigation with respect to a drug monitored by the program under their statute; and
2. The person is identifiable in their data base.

[42] Mr. Lynch was questioned about s.23 of the ***Prescription Monitoring Act*** and specifically the language regarding the Administrators requirement to possess "reasonable grounds to believe" an offence may be occurring as a condition for disclosure. He was asked whether he ever received any legal training or instruction on this standard. He indicated he had not. He advised that in his view he was continuing the operation of this component of the program (i.e. disclosure on request to law enforcement) as it had existed at the time he became Director.

[43] In Brenda Hannam's evidence, she testified as to the administrative process she would follow as a front line person dealing with law enforcement requests for

information from the Program. Ms. Hannam indicated that she saw her role as one of "ticking the boxes". If the form was (1) properly filled in with a name and matching date of birth and (2) this person could be identified as being in receipt of monitored prescriptions and (3) the request came from law enforcement with respect to an ongoing investigation then she permitted the disclosure.

DID THE ACTIONS CONSTITUTE A SEARCH?

[44] The s. 8 guarantee of security against unreasonable search and seizure protects only a reasonable expectation of privacy. That is the finding of ***R. v. Tessling***, 2004 3 S.C.R. 432 and ***Canada v. Southam Inc*.,** [1987] 2 S.C.R. 145. To determine whether an investigative procedure invades a reasonable expectation of privacy requires consideration of all the circumstances, including whether a subjective expectation of privacy exists and, if it does, whether the expectation is objectively reasonable in the circumstances.

[45] The privacy interest protected by s. 8 include personal privacy, territorial privacy and informational privacy. We are concerned here with informational privacy. Informational privacy relates to how much information about ourselves and our activities we are entitled to shield from the eyes and ears of the state. This was discussed in the ***Tessling*** case. Informational privacy is a claim of individuals,

groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others. Section 8 protects the biographical core of the personal information that individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This is canvassed in ***R. v. Plant***, [1993] 3 S.C.R. 281. This biographical core includes but is not confined to information that tends to reveal intimate details about an individual's lifestyle and personal choices. Merely because the information for which protection is sought is commercial in nature does not exclude it from protection. Section 8, however, does not protect every piece of information that an individual may wish to keep confidential.

[46] When concerns about informational privacy are raised the quality and nature of the information said to be protected is important. Relevant factors that inform whether information will fall within or beyond the interest protected by s. 8 are set out by the Supreme Court of Canada in ***R. v. Plant***, supra. These include but are not to be limited to:

1. The nature of the information itself;

2. The nature of the relationship between the party releasing or holding the information;

3. The party asserting confidentiality;

4. The place where the information was obtained; and

5. The manner in which the information was obtained.

[47] It is worth remembering that all reasonable expectations of privacy are not equal. Some of them are of greater magnitude than others. For instance, the degree of personal privacy reasonably expected at Canada Customs on entry to the country is lower than most other situations. This standard is well established in law.

[48] I refer as well to the case of ***R. v. Mahmood***, [2011] ONCA 693 (Ont. C.A.), where it is stated:

> Likewise a comparatively low expectation of privacy attached to premises or documents used or produced in the course of activities which the lawful are state regulated. And thus, routinely inspected by state officials. Business records raise much bigger privacy concerns than personal papers.

See also ***Thompson Newspapers v. Canada (Attorney General)***, [1998] 1 SCR 877.

[49] The Supreme Court of Canada further considered the individual's right to protect information about themselves in ***R. v. Dyment,*** [1988] 2 SCR 417. Following a motor vehicle accident a doctor treating the accused collected a vial of

blood for medical purposes without the accused's knowledge or consent. The doctor later gave the sample to the police. The blood sample evidence was used to charge and convict the accused of driving "over 80". The accused argued that his s.8 rights had been violated.

[50] La Forest J. agreed, discussing the right and saying, in part:

> 33. Finally, there is a privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own for him to communicate or retain for himself as he sees fit. In modern society, especially, retention of information about one's self is extremely important. We may, for one reason or another, wish or be compelled to reveal such information but situations abound where the reasonable expectations of the individual and the information shall remain confidential for the persons to whom and restricted to the purposes for which it is divulged must be protected.

Because the accused had a reasonable expectation of privacy over the blood sample evidence, the reception of the blood sample from the doctor amounted to a seizure within the meaning of s.8. La Forest found it significant that the blood sample had been taken for medical purposes and for no other purpose.

[51] In ***R. v. Plant***, supra, the Supreme Court of Canada considered whether the Police violated the accused's s.8 rights where they obtained the public utilities electrical billing record for his residence. The police obtained the records after receiving a tip that a house was being used to grow marijuana. The records formed

the basis for a search warrant. Sopinka J. explained that determining the scope of the protection afforded by s.8 requires a contextual approach, including consideration of such factors as the nature of the information, the nature of the relationship between the parties, the place where the information was obtained, the manner in which it was obtained and the seriousness of the crime being investigated.

[52] Sopinka J. noted these figures allows for a balancing of societal interests in protecting individual dignity, integrity and autonomy, with effective law enforcement. Sopinka J. applied those factors to the case before him and concluded the accused did not have a reasonable expectation of privacy in relation to the electricity billing records. First, the information was not of a personal and confidential nature. Second, the accused and the public utility did not have a relationship of confidence. Finally, the seriousness of the offence facilitated in favour of the conclusion that the requirement of law enforcement out-weighed the accused's privacy interests.

[53] In conclusion, Sopinka J. found the accused did not have a reasonable expectation of privacy in relation to the electricity billing records that out-weighed the state interest in enforcing the laws related to narcotic offences.

[54] There can be a diminished expectation of privacy in a sphere of activity that is heavily regulated. In ***R. v. Fitzpatrick***, [1995] 4 S.C.R. 154, the captain of a fishing vessel was charged under the ***Fisheries Act*** with catching and retaining fish in excess of his quota. The Supreme Court of Canada found that the fishing captains logs and hail reports were not subject to s.8 protection. La Forest J., writing for the majority, noted that fishers were required to submit documentation to the Department of Fisheries and Oceans. He commented:

> In applying a contextual approach under s.8 this Court has repeatedly emphasised that searches and seizures of documents related to activity known to be regulated by the state are not subject to the same high standard as searches and seizures in the criminal context. This is because a decreased expectation of privacy exists respecting records that are produced during the ordinary course of business. In my view, a similar standard should be applied to the use in a regulatory prosecution of records that are statutorily compelled as a condition of participation in the regulatory area. Little expectation of privacy can attach to these documents since they are produced precisely to be read and relied upon by state officials.

Thus, La Forest emphasised that the fishing logs and hail reports were ordinary records that were required in the course of conducting this line of work. The documents were produced precisely so they could be read and relied upon by state officials and little expectation of privacy existed.

[55] La Forest noted that there had been nothing stressful or offensive in the manner of the search. The search was not conducted at the accused's home and did

not impose any of the psychological or emotional pressures associated with police interrogations. The search had been of records maintained in a database.

[56] I refer to this case not because it is factually identical to the present case but rather because the comments with respect to activity in highly regulated spheres of activity are notable.

[57] In ***R. v. King,*** [2009] P.E.I.J. No 15 (PEICA), the trial Judge had refused to admit evidence of lobster measurements finding the evidence had been obtained in violation of s.8. The Court of Appeal disagreed and ordered a new trial explaining:

> An important component of a contextual analysis of all the circumstances of each case is whether the legislation from which the powers of the officer are derived is regulatory or criminal. There is a much reduced expectation of personal privacy where inspection powers are exercised upon an individual participating in a highly regulated endeavour like the fishery. In a regulated environment the individual's privacy interest must give way more quickly than in criminal or quasi criminal environment the need for broader powers of search and seizure.

The Court of Appeal concluded that the accused had no reasonable expectation of privacy in the marine terminal, or the warehouse where the lobsters were located.

[58] The Nova Scotia Court of Appeal reached a similar result in the case of ***R. v. Wilcox,*** [2001] N.S.J. No. 85 (C.A.). Fisheries records were seized in the course of an inspection pursuant to s.49 of the ***Fisheries Act***. The Court of Appeal found that the inspection was carried out in compliance with that statutory authority.

Further, the search did not offend s.8 of the ***Charter*** because the accused had "only the most modest reasonable expectation of privacy" over the fishing records.

[59] Cromwell J.A, then of the Appeal Court, agreed with the following findings of the Trial Judge:

> The theme that runs through all the comment is that this is after all a regulatory scheme that we are dealing with. Those who are involved as fishers, or buyers, or sellers, must be taken to do so with their eyes wide open. Mr. Wilcox specifically has been around the industry most of his life and most of that in a very responsible capacity. He has to be taken to be aware of these facts, these elements of the industry to which I have just made reference. His expectation of privacy based on the evidence that I have seen brought forward, particularly in his business premises and especially in respect of documents he is required to generate and to make available, cannot be a very high expectation.

[60] Cromwell J.A., cited the ***Fitzpatrick*** case for the proposition that searches and seizures of documents relating to activity known to be regulated by the state are not subject to the same high standard as searches and seizures in other contests.

[61] Again, I am not citing these cases for the fact that they are identical factually, I am simply noting the references to the diminished expectation of privacy which exists in certain heavily regulated spheres of activity.

[62] In ***R. v. D'Amour***, [2000] O.J. No. 5122 (Ont. SCJ), the accused was charged with welfare fraud. The Ontario Court considered whether the police violated the accused's s.8 rights by obtaining the accused's financial information,

i.e., bank statements and wage statements, from the Social Services Agency. Hepstein J., found that such information:

> Tends to reveal intimate details of the lifestyle and personal choices of the individual.

Regarding the relationship between the accused and the agency he said as follows:

> This relationship provides the foundation for my determination that this application for exclusion of evidence based on alleged violation of the applicant's ***Charter*** rights ought to be dismissed. In my view this relationship can be categorized as a relationship of confidence for some purposes but not for others. In some instances one can envisage that the applicant's financial information may be subject to the privacy protection afforded by s.8 of the ***Charter***. However, a s.8 claim is foreclosed when it comes to use and disclosure of the personal information to which the applicant has consented.
>
> As I pointed out earlier in this ruling, the applicant completed and signed various forms for the purpose of applying for and ultimately receiving financial assistance. These two forms addressed the use and potential use that may be made of the Applicant's financial information and documentation. By executing form 3, the applicant consented to the exchange of information between the municipality and any other government agency. Albeit for the sole purpose of verifying eligibility. By executing form 1 the application must be taken to have understood that there could be other potential uses for her private information. One of these uses is set out in the legislation identified in form 1…. These provincial statutes allow the agency to disclose personal information to a law enforcement agency in Canada to aid in investigation undertaken with a view to a prosecution or where a prosecution is likely to result.

Hepstein J. found that the place and manner in which the information was obtained also pointed to the conclusion that the accused had no reasonable expectation of privacy with respect to her financial records. The accused brought this documentation to the agency in circumstances where she knew, or ought to have known, of an investigation into the legitimacy of her receipt of benefits was

possible and neither the agency, nor the police used intrusive or high handed tactics to obtain the information.

[63] Furthermore, the Court concluded the accused could reasonably have expected that this would happen. Finally, the seriousness of the offense of welfare fraud and the requirements of enforcing welfare laws outweighed the accused's privacy interest. The search, therefore, fell outside the parameters of s.8.

[64] Each of those cases could obviously be argued to have distinguishing facts from the present case and this would be correct.

[65] There is a specific question with respect to reasonable expectation of privacy in medical information. The cases demonstrate that a person will normally have a reasonable expectation of privacy over their medical information.

[66] Returning to the ***Dyment*** case we can recall Justice La Forest's finding that a seizure within the meaning of s.8 had occurred. Implicit in this finding was the conclusion that the accused had a reasonable expectation of privacy over his blood sample. La Forest J. further noted an important policy consideration, because a person in need of health care might be deterred from seeking this care if they believed the information was subject to disclosure to the police.

[67] In ***R. v. Spidell***, [1996] N.S.J. No. 211 (C.A.) the accused was convicted of refusing to comply with a demand for a blood sample. He had been involved in a motor vehicle accident and the demand for a blood sample was made after the accused's doctor told the police the accused said he had been drinking. On appeal the accused argued that his s.8 rights were infringed when his doctor provided this information to the police.

[68] Roscoe J. A. referred to the concerns expressed by La Forest J. in ***Dyment*** with respect to making physicians and other health care workers part of a law enforcement machinery of the state. Roscoe J. A. adopted the Trial Judge's findings that the defendant's statements as to his prior drinking were made in response to a doctor's questions and was part of the course of medical diagnosis and treatment. However, she went on to conclude:

> The nature of the information provided to the police, that is the appellant was drinking when he had been driving and that he had consumed alcohol, is not personal and confidential in nature. It is not part of the biographical core of the appellant nor can it be said to involve intimate details of his personal lifestyle or of a private decision. The information does not become medical in nature simply because it was given to a doctor. It is in my opinion closer to the neutral nature of the power consumption records then, for example the blood test results in ***Dersch***. The information in this case is of the type referred to by Major J. in ***Dersch*** at para. 23, that is neutral information such as the presence of the patient in a hospital.

[69] It is evident the determination of whether the accused had a reasonable expectation of privacy over the information in issue involves a highly contextual analysis.

[70] Confidentiality of medical information is closely guarded by statutes such as the ***Personal Health Information Act, S.N.S***. 2010, c. 41. The information cannot be disclosed except in accordance with the ***Personal Health Information Act*** or other statutes such as the ***Prescription Monitoring Act.*** The ***Prescription Monitoring Act*** is recognized under the ***Personal Health Information Act*** as a statutory exception to the ***Personal Health Information Act*** requirements.

[71] The relevant portions of the ***Prescription Monitoring Act*** include the following:

> **Establishment and operation of prescription-monitoring program**
>
> 5(2) The objects of the program are to promote:
> (a) the appropriate use of monitored drugs; and
> (b) the reduction of the abuse or misuse of monitored drugs. …
>
> **Administrator**
>
> 12(1) The Minister shall appoint an Administrator.
> (2) The Administrator shall:
> (a) administer the Program to assist the Board in carrying out its duties under Section 6;

(b) monitor prescribing practices and dispensing practices respecting the monitored drugs;

(c) assist the Board in evaluating the effectiveness of the Program;

(d) provide information, professional consultation and assistance to licensing authorities about the prescribing and dispensing of monitored drugs as requested by the licensing authorities;

(e) monitor the use of monitored drugs by residents and report inappropriate use to:

(i) an appropriate law enforcement authority pursuant to subsection 23(1),

(ii) an appropriate licensing authority pursuant to subsection 23(2), or

(iii) a pharmacist or prescriber,

if the Administrator is satisfied that the release of such information furthers the objects of the Program;

(f) provide reports to the Board respecting the results of the monitoring carried out pursuant to clauses (b) and (e);

(g) provide information and professional consultation and assistance to prescribers and pharmacists respecting the prescribing and dispensing of monitored drugs;

(h) educate prescribers and pharmacists about appropriate prescribing and dispensing of monitored drugs;

(i) respond to inquiries from the public with respect to the Program; and

(j) report to the Board, the Minister and licensing authorities on new and emerging prescribing patterns for monitored drugs in all or part of the Province and other jurisdictions as those patterns become known to the Administrator.

(3) For the purpose of:

(a) Monitoring

(i) prescribing practices,

(ii) dispensing practices, and

(iv) the use of monitored drugs; and

(b) evaluating the effectiveness of the Program, the Administrator may collect, compile and disseminate information the Administrator considers necessary in accordance with this ***Act***.

(4) The Administrator shall appoint a Manager of the Program and seek input from the Board when appointing a Manager.

(5) Any actions of the Manager of the Program made in respect of this ***Act*** are deemed to be the actions of the Administrator.

Provision of information to Administrator

18 Upon the request of the Administrator, prescribers and pharmacists or any other body or person shall provide to the Administrator any information, including medical records, the Administrator reasonably requires to achieve the objects of the Program.

Use of information

19 Information received by

(a) The Administrator;

(b) Any person employed by the Administrator pursuant to this ***Act***; or

(c) The Board,

shall only be used in accordance with this ***Act*** and the regulations and not for any other purpose.

Powers of Administrator to communicate with authorities or file complaints

23(1) Where the Administrator has reasonable grounds to believe that an offence has been committed contrary to the ***Controlled Drugs and Substances Act*** (Canada) or the ***Criminal Code*** (Canada) or successor legislation, information in the possession of the Administrator in respect of such offence may be communicated to the appropriate law enforcement authority by the Administrator or such person as may be designed by the Administrator.

(2) the Administrator may, at any time, file a complaint with the licensing authority regarding the activities of a member of that licensing authority if the Administrator has reason to believe that the member may be practising in a manner that is inconsistent with the object of the Program.

(3) Where the Administrator lays a complaint pursuant to subsection (2), the Administrator shall provide the licensing authority with all relevant information on which the complaint is based.

Offence and penalties

25(1) A person who violates this ***Act*** or the regulations is guilty of an offence and liable on summary conviction to the penalty provided for in the ***Summary Proceedings Act***.

(2) All fines and penalties payable under this Section as a result of a prosecution by or on behalf of the board belong to the Board.

(3) Any information to be laid pursuant to this ***Act*** may be laid by the Chair of the Board with the consent of the Minister of Health.

[72] I have concluded that the nature of the information here is narrowly that which can be identified as biographical core despite the fact that it has happened in the context of a highly regulated sphere of activity. It is not merely neutral in nature such as the fact that the accused was involved in a motor vehicle accident, or the fact that the accused was present in hospital as is referred to in some of the case law. This was medical information which was not available to the public at large.

[73] Accordingly, I find that Mr. Snowdon has demonstrated that he had a reasonable expectation of privacy over his monitored prescription records. They did include personal biographical information. However, this determination only brings us part of the way down our decision tree.

[74] I want to refer to the case of ***R. v. Habib***, [2016] A. J. No. 669 (Alta. CA.), released in July, 2016. This was of interest in this matter as up to that point the parties have been largely unable to locate any cases with factual parallels directed at the present case. In saying this, I am not overlooking the ***Oregon*** case identified by counsel for the Applicant, that being ***John Doe v. Oregon*** (U.S. Dist. Ct. – Oregon, Feb 11, 2014). That case has limitations, however, given the different jurisdiction and the fact that it was based upon a set of facts which do not mirror ours closely. There are principles in it, however, which have been reviewed and evaluated by the Court.

[75] In ***Habib*** the Court of Appeal considered a factual situation in which the defendant appellant asserted that his rights had been violated when the police obtained prescription records without the use of a search warrant or production order. The facts are different of course from our present case and there are issues which do not present themselves on our facts. There are however some parallels as

well. I want to reference the relevant issue as framed by the Court. It was expressed as follows:

> Should the pharmacist's and physician's medical records have been excluded from admission into evidence at trial pursuant to s.24(2) of the ***Canadian Charter of Rights*** because of the breach of s.8 of the ***Charter*** through their seizure by police in the absence of a production order or search warrant.

[76] A few things to note. The evidence in the ***Habib*** case was shared by a Calgary pharmacist with the police. The police believed no warrant or production order was required because they knew the ***Alberta Health Information Act*** authorized the release of health related information in certain circumstances. Section 37.11 of the Alberta legislation says as follows:

> A custodian may disclose individually identifying health information…without the consent of the individual who is the subject of the information to a police source…where the custodian reasonable believes:
>
> (a) That the information relates to the possible commission of an offence under a statue or regulation of Alberta or Canada;
>
> (b) The Appellant argue that the manner of the transfer of the records in no way complied with the Act and clearly was not based on a warrant or production order. The suggestion was made that Mr. Habib considered seeking a declaration that the Act was unconstitutional even assuming the terms had been complied with.

The Court examined the Appellant's claims and concluded that even if Mr. Habib had been permitted to advance all his arguments at trial he would not have succeeded. The Court assumed for the purposes of the analysis that the records

had been obtained in a manner that violated the accused's s.8 ***Charter Rights***. Even assuming this the Court concluded that the records would not have been excluded under the s.24(2) analysis.

[77] The Court's analysis is summarized as follows: (para 34)

> Had Mr. Habib successfully pursued his challenge at trial it would have led to a s.24(2) analysis. The analysis would have considered the fact that the evidence was not gathered in bad faith. Constable Huggan believed he had authority to do so. He appeared to have that express authority under provincial legislation. His activities cannot be characterized as a wilful or flagrant disregard of the ***Charter***. The police acted by what they reasonably thought were lawful means to pursue important law enforcement objective - the protection of the public from those who engage or facilitate trafficking of narcotics obtained by prescription.

They went on to note:

- The information was obtained without a violation of the physical integrity of Mr. Habib. This is a factor to be considered arising out of case law already referred to.
- The information was objectively highly reliable.
- While the impact on the privacy right was substantial, society also has an interest in seeing serious matters such as this proceed to trial.
- Prescription abuse continues to be a very serious problem in Canada.

Elements of this analysis resonate with the facts in the present case.

VIOLATION OF S.8

[78] In *R. v. Habib* the presumption of a violation of s.8 was made by the Court. In our present case we are now at the stage of concluding whether a violation of s.8 occurred on our facts given the seizure of the material in which there was a privacy interest.

[79] The Crown in its very able submissions argued that the Appellant ought to enjoy either no reasonable expectation of privacy with respect to these records, or minimal. I have concluded that it is not the case that there is no expectation of privacy. An expectation of privacy does exist, albeit a reduced expectation within the context of a highly regulated sphere of activity.

[80] As was said in ***R. v. McKinlay,*** [1991] S.C.R. 627:

> Since individuals have different expectations of privacy in different contexts and with regards to different kinds of information and documents, it follows that the standard of review for what is reasonable in a given context must be flexible if it is to be realistic and meaningful. Accordingly, I do conclude that the actions did constitute a search, albeit into a sphere where the reasonable expectation of privacy was lowered.

This fact will continue to be relevant with other points in the analysis. Most notably s.24(2).

[81] If we return to the decision tree that we are moving through today, I have concluded the actions of the Police did constitute a search and this search was conducted in violation of Mr. Snowdon's s. 8 protections.

[82] However, we must now carry on to identify how this impacts on the grounds for arrest and, in turn, on the grounds in the ITO?

GROUNDS FOR ARREST

[83] Section 495 of the ***Criminal Code*** governs police authority to make warrantless arrests.

> A Peace Office may arrest without warrant a person who has committed an indictable offence or who on reasonable grounds he believes has committed, or is about to commit an indictable offence.

[84] Reasonable and probable grounds must be present for an arrest to be valid under s.9 of the ***Charter*** which protects individuals against arbitrary arrest and detention. The Supreme Court sets out the test for establishing reasonable grounds for arrest in the case of ***R. v. Storey,*** [1990] 1 S.C.R. 241:

1. It must have been objectively reasonable so that a reasonable person would think it was appropriate;
2. The arresting officer must subjectively believe that there were reasonable and probably grounds for the arrest at the time the arrest was made.

[85] The standard of what will constitute reasonable grounds is more than mere suspicion but does not require proof on a balance of probabilities. The Police do not need to establish that their belief with regard to the grounds for arrest is the only possible conclusion.

[86] In the present case Constable Vincent was the officer who directed the arrest and the Court must, therefore, assess whether he had sufficient reasonable and probable grounds within the meaning of ***R. v. Debot,*** [1989] 2 S.C.R. 1140.

[87] That Constable Vincent subjectively believed that reasonable and probable grounds existed is not truly contested here. The issue before the Court is whether that belief would be objectively reasonable.

What grounds did Constable Vincent have to rely on?

[88] Constable Vincent referred to information obtained by police from various confidential informants as contributing to his belief that there were reasonable and probable grounds for arrest. The Supreme Court of Canada in ***Debot*** sets out the following factors to assess the reliability of informant evidence.

1. Whether the informant was credible?

2. Whether the information predicting the commission of a criminal offence was compelling?
3. Whether the information was corroborated by a police investigation?

[89] These factors are not separate tests as weakness in one aspect may be overcome by strengths in other areas. It is not necessary that every aspect of the source information be corroborated in order for it to be considered reliable. However, the level of verification required will vary depending on the quality of the information and the reliability of the source.

[90] The Court is required to assess reasonable grounds in the totality of the circumstances and not on the informant evidence alone. There is an absolute requirement to assess this not on a "piece meal" basis but rather in totality. I recognize that the prescription monitoring information strengthened the grounds. However, it is certainly the case that reasonable grounds for arrest without warrant have been formed by officers in similar circumstances without the assistance of information such as that provided by prescription monitoring.

[91] In this case I am persuaded by the strength of the confidential informants of past proven reliability. I weigh the observations made by the officer as well as the other factors set out by him in evidence. I find that in analysing all the

circumstances together and not on a piece meal basis, the totality of what he identified in his evidence, even absent the Prescription Monitoring Program data, can form the basis of reasonable probability or reasonable belief.

CONFIDENTIAL INFORMANT INFORMATION

[92] Constable Vincent's trust and confirmation of his source's reliability was to me compelling and convincing. I reference a portion of ***R. v. Dunbar***, [2008] N.S.J. 290, in which the Judge in that case stated as follows at para 27:

> It is not essential in my opinion that there have been independent corroboration of a tip information where the information is compelling as it was here and originated from a credible source. Corroboration functions to verify the reliability of the tip and that reliability was established here to the source's past performance. Garofoli emphasizes past performance of the source as the standard to be applied.

Dunbar was a case of a single source. There is much case law which notes that when you move from a single source case to a multi-source case this information will be weighed together.

Accordingly, I find that there were grounds for arrest and that arrest was made lawfully. There was a lawful search incident to arrest.

[93] The material that was obtained in that search has already been referred to in evidence, including reference to the funds which later appears in the ITO as well as the receipt confirming the picking up of the prescription.

[94] I want to note this – an actual reference to the receipt does not appear in the ITO. Instead, what is in there is reference to the Applicant having stated that he had picked up the prescription and had consumed some of it.

[95] There was also information in the ITO, as well, from the pharmacist confirming the prescription had been picked up. Again, we are going to come and look at what remains in the ITO, even after the Prescription Monitoring Program information is excised for the purpose of this analysis.

JUDICIAL REVIEW OF THE SEARCH WARRANT

[96] With respect to judicial review of the ITO there is essentially no dispute between the parties with respect to the standards of review to be carried out by the reviewing Court. The shortest of overviews will suffice. A judicially authorized search warrant is presumptively valid and the accused has the onus of demonstrating that there was no basis for its issuance. The Applicant bears the burden of establishing on a balance of probabilities that any search violated that Applicant's ***Charter*** rights and that the evidence seized as a result should be excluded pursuant to 24(2).

[97] The trial Judge reviewing the sufficiency of the ITO may not substitute his or her view to that of the issuing Justice. The question is not whether the trial Judge would have issued the warrant but whether the issuing Justice could have issued it based on the record as amplified on review.

[98] As stated by the Supreme Court of Canada in ***R. v. Garofoli*** [1990] 2 SCR 1421:

> The reviewing Judge does not substitute his or her view for that of the authorizing Judge if based on the record which was before the authorizing Judge, as amplified on the review, the reviewing Judge concludes that the authorizing Judge could have granted the authorization and he or she should not interfere. In this process the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant but rather than being a pre-requisite to review their sole impact is to determine whether there continues to be any basis for the decision of the authorizing Judge.

[99] An ITO is sufficient to support a search warrant if in the totality of the circumstances it reveals reasonable grounds for the affiant to believe that the suspect committed an offence and evidence of that offence will be found at the target location. As we have already noted, the identification of reasonable grounds engages both a subjective and objective component. The objective component does not require proof beyond a reasonable doubt for the establishment of a *prima facie* case. Rather the standard is one of credibly based probability and requires

proof of reasonable probability or reasonable belief. It certainly requires more than a hunch or suspicion.

[100] In cases where portions of an ITO have been redacted the balance of it will be weighed. In this case, reference to the information from the Prescription Monitoring Program, will be excised.

[101] I want now to turn to that exercise after making one reference one further reference to *R. v. Mahmood, supra*.

[102] I intend to follow the process referenced in this case where they address the question of how information obtained by unconstitutional means, which makes its way into an ITO, ought to be dealt with.

[103] In *Mahmood* at para. 115 the Court directs as follows:

> Prior unconstitutional conduct is relevant in two discreet contexts in this case. The first has to do with excision from the ITO of information obtained by unconstitutional means. The second relates to the influence of prior unconstitutional conduct on the application for s.24(2) to evidence obtained later in investigation and not directly as a result of the previous constitutional infringement. The parties agree about excision. Information obtained by unconstitutional means must be excised from the ITO on ***Garofoli*** review and what remains, as amplified on review must be assessed to determine whether the warrant could have issued.

What would be left in the ITO after excising the information from the Prescription Monitoring Program?

[104] The ITO itself is obviously before all the parties. It opens with the section, "Officer Qualifications" covering the first two paragraphs. Paragraph three sets out the data bases relied upon. The central core of the ITO begins at paragraph 6. It indicates that Constable Vincent has a confidential source who he has known for four years. It is acknowledged that the source associates freely with persons involved in criminal activity.

[105] For four years Source A has been used as a source. He believes the source. Constable Vincent maintained contact with Source A on a regular basis ranging from weekly to monthly. Source A does have a criminal record, however, there have been no charges or convictions for perjury or public mischief. I say parenthetically, I do not find that summary of the record terribly helpful and the comments of Defence counsel were well taken in that regard.

[106] The information provided by Source A has been in relation to controlled substances, contraband tobacco products, property crimes, impaired driving offences and warrants of arrest. Source A, it was said, has been paid in the past for information provided, the most recent payment being in the winter of 2013. Source A provided information on no less than 110 separate instances. No less

than 12 searches based on the information provided by Source A result in seizure and positive identification of controlled drugs, tobacco or offence related property, in all but two instances. However, in these two instances the actual information provided by Source A was corroborated by Police surveillance and statements that were provided.

[107] The information provided by Source A had been corroborated where possible by investigation, charges and information supplied by other sources. Source A is stated to have personal knowledge of the information obtained herein based upon conversations and observations of a person involved unless otherwise stated.

[108] Source A has provided information to the Police on the condition of anonymity. Source A is not willing to act in the capacity of an agent for the Police and testify against any of the persons in this affidavit.

[109] The ITO goes on to speak in paragraph 7 of Source B, also acknowledged to be an individual who associates freely with persons involved in criminal activity and who is stated he believes. Cst. Vincent states he has known Source B for five years. For the past four years Source B has been used in the capacity as a source.

He has maintained contact with Source B on a monthly basis. Again Source B is stated to have a criminal record but none related to perjury or public mischief.

[110] The information Source B has provided has been in relation to controlled substances and contraband tobacco products. Source B has been paid in the past for information provided and the last payment was in the third quarter of 2012. Source B has provided information in excess of 20 separate instances. Five search warrants have been approved and executed based on the information provided by the source. The search warrants resulted in a positive search each time for controlled drugs and/or seized property and criminal convictions. Of the information provided by Source B in three separate instances the information could not be confirmed due to the possibility of jeopardizing the identity of source of B. It goes on to state that the information supplied by Source B has been corroborated by investigation charges and information supplied by other sources. Source B's personal knowledge of the information contained herein was based upon conversations with persons involved.

[111] Source B has provided information to the Police on the condition of anonymity. Source B is not willing to act in the capacity of an agent for the Police and testify.

[112] At paragraph 8 of the ITO it is alleged that on January 26, 2012 Source B told Constable Vincent that Kevin Dwyer is selling dilaudid and hydromorphone in Maccan. Dwyer sells 6's for $10.00 and 12's for $20.00. The buyer is currently on methadone. He buys the pills for half the price he sells for. He can no longer get the prescriptions from his doctor. He lives in the Town of Maccan across the train tracks.

[113] On August 1, 2012 Source B told Constable Vincent that Kevin Dwyer is selling dilaudid pills, specifically dilaudid. On March 5, 2012 the Cumberland Integrated Street Crime Enforcement Unit arrested Michael John Snowdon for possession of a controlled substance after he was observed making a short duration visit to a residence known to be trafficking controlled substances. Upon search incidental to arrest Mr. Snowdon was found in possession of 10 dilaudid tablets which were wrapped in the tin foil of a cigarette package. Details of the conviction were recounted.

[114] The ITO goes on to recount that on January 22, 2013 Source A told Constable Vincent that the guy living at 58 Hickman Street, Amherst is selling prescription pills. He is selling hydromorphone 24 milligrams. He has a prescription for the hydromorphone. He also buys hydromorphone to resell.

[115] Source A is said to have heard this through associates that frequent 58 Hickman Street to purchase hydros. Constable Vincent is said to have related that on March 5, 2012 he arrested Michael John Snowdon for possession of hydromorphone which he was subsequently convicted.

[116] A Source of unknown reliability is referenced at paragraph 14. Defence counsel correctly points out that much less information is given with respect to this individual, however, the person is clearly stated to be a person of unknown reliability in the affidavit. That individual said that Mike Snowdon of 58 Hickman Street was selling hydros. He sells one hydro capsule for $40.00. Snowdon has a prescription for the hydromorphone and gets refilled every month. Mr. Snowdon also buys hydromorphone to resell. Snowdon lives in a yellow two storey house with the number 58 spray painted on the front door. This was verified on a drive by surveillance.

[117] Forthrightly the information obtained indicates that the source did not have a demonstrated history of proven reliability and no credibility assessment was offered.

[118] I am not going to read the case law which talks about the fact that all evidence must be weighed together. On its own information, from a source of

unknown reliability of this nature, I agree, would not cut it. It must be weighed together with all of the observations, all of the other source information, including in this case the source information of persons of known believability.

[119] The ITO goes on to say at paragraph 15 that the same source of unknown reliability had accounted to both Constable Vincent and Constable Munn that Snowdon most recently sold hydromorphone. It stated as well that Kevin Dwyer of Maccan buys prescription medication from Snowdon and then resells the product for a higher price.

[120] On January 24, 2013 Source A told Constable Vincent that Snowdon sold one hydro 24 milligram to a buyer within the past 24 hours. The source of this information was redacted. Again, I emphasize, all the information must be weighed together with all of the other source information.

[121] Paragraph 17 is the paragraph detailing Constable Vincent's contact with the PMP. This ITO will be assessed on the basis that this will be redacted.

[122] Paragraph 18, that on January 25th the same source of unknown reliability, as mentioned in paragraphs 14 and 15, told Constables Vincent and Munn that Snowdon recently sold hydromorph from his residence. The source was stated to

be in Snowdon's residence within the past 24 hours and observed Snowdon sell four hydro 24's for $160.00.

[123] Paragraph 19 refers to information from the PMP which will be redacted.

[124] Paragraph 20 details surveillance on the Snowdon residence at 15 Hickman Street on February 15th as previously referred to.

[125] Paragraph 21 details the stop, the placing of Snowdon under arrest, the location of the funds previously referred to and, as well, reference to Snowdon having told Constable Vincent that he ingested four hydromorphone.

[126] Paragraph 22 and 23 detail the contact with the pharmacist as previously noted.

[127] Out of an abundance of caution, I am opting to weigh this affidavit after having redacted reference to the information that Snowdon "picked up a prescription today at approximately 10:01". For reasons of caution I will consider this redacted and weigh the ITO accordingly.

[128] Having concluded that there was a proper arrest without warrant and search incident to arrest, I will consider the information that flowed from the search incident to arrest as it appears in the ITO.

[129] I would note that the evidence revealed certain typographical errors in the ITO, for instance an error in a date of birth. These were corrected in evidence and this was not a controversial aspect of the weighing process.

[130] I wish to make several comments with respect to the ITO. I do not find the references to the source of unknown reliability having no record for "perjury or obstruction" to be helpful. I do accept it appears in the ITO because that has been the formulation adopted by Constable Munn in the past. That sort of formulation by rote ought to be discouraged. However, I concluded that in this case it has no material impact on how the ITO was weighed or ought to be weighed. The ITO is clear in my view that it was making a differentiation between the past proven reliability of Sources A and B and the third source of unknown reliability. That is entirely appropriate.

[131] I have as part of the assessment process weighed all of the information together. Strength in one aspect can support and strengthen weakness in another aspect. Different sources of information can tend to validate each other even where one of the sources may have less of a proven history than another. It would not be appropriate to consider the evidence on a piece meal basis. Rather the

cumulative effect weighed through the eyes of an experienced officer is the proper approach.

[132] I find that even with the excisions, as noted, the presumption of validity for the warrant was not displaced and the warrant was supported by evidence collectively amounting to the requisite reasonable and probable grounds for its issuance.

[133] Primarily what a reviewing Court is looking for are deficiencies in the ITO relating to the facts, the overstating of facts, the misstating of facts, or the failure to state material facts. Any one of these deficiencies may lead to a finding that the search warrant is invalid. Evidence that is found to have been improperly before the Court should be excised and, in this analysis, has been excised by the reviewing Court. That is the clear direction of the Supreme Court of Canada in ***R. v. Plant***. Once the offending evidence has been excised the question becomes whether what remains could properly result in the issuance of a warrant. The reviewing Court must look at the totality of the circumstances that were before the issuing Court and I have done so.

[134] One final quote that I would leave this section with, because of the importance to this analysis of the confidential informants. In ***R. v. Lindsay***, 2015 (Ont. S.C.J.) 1369, paragraph 180 the court says as follows:

> Although confidential informants four and five have never previously supplied information to police this does not mean they are not to be believed. Their credibility is established to some degree by the fact that they are generally corroborative of other confidential informants.

I find this comment applicable in the circumstances of this multi-source case.

[135] In the decision tree I have concluded that the warrant is supportable.

R. v. GRANT ANALYSIS

[136] I have concluded that the arrest and search warrant were valid even in the absence of the PMP evidence. However I intend to proceed with a s. 24(2) analysis in the alternative.

[137] The Supreme Court of Canada in ***R. v. Grant*** provided the framework to consider when evidence which was obtained in violation of the ***Charter*** must be excluded because it would bring the administration of justice into disrepute were it to be entered into evidence before the trier of fact.

[138] The Court must consider:

1. The seriousness of the ***Charter*** infringing state conduct which requires an assessment of whether the admission of the evidence wold bring the administration of justice into disrepute. This focuses on the severity of the state conduct that lead to the ***Charter*** breach. This includes an analysis of whether the breach was deliberate and wilful or whether the officers acted in good faith.

2. We are directed to consider the impact on the ***Charter*** protected interests of the accused which focuses on how the accused person was affected by the state conduct. This includes an analysis of the intrusiveness into the person's privacy, the direct impact of the right not to be forced to self-incriminate and the effect on what has been called the individual's human dignity.

3. We must weigh society's interest in an adjudication on the merits. This focuses on how reliable the evidence is in light of the nature of the ***Charter*** breach. In conducting this balancing exercise, the Court is required to assess the above factors to determine whether a reasonable person informed of the circumstances of the case and the

values underlying the ***Charter*** would conclude that the admission of the challenged evidence would bring the administration of justice into disrepute.

SERIOUSNESS OF THE *CHARTER* INFRINGING STATE ACTION

[139] This stage assesses the blameworthiness of the police conduct that infringed the ***Charter*** rights of the accused. The Supreme Court in ***R. v. Grant*** stated that the more severe or deliberate the state conduct that lead to the ***Charter*** violation, the greater the need for Courts to dissociate themselves from that conduct. By excluding the evidence linked to that conduct. Systematic or institutional abuse of the constitutional right may be an aggravating factor making the misconduct more serious.

[140] The Supreme Court in ***R. v. Grant*** directs that the evaluating Court must consider the seriousness of the conduct that lead to the breach. There is a continuum of behaviour leading to breaches. It has been expressed by different Courts as a variable, not a constant. Sometimes inadvertent or minor, at other times wilful or flagrant. In many instances somewhere in between. Good faith on the part of the police will reduce the need for the Court to dissociate itself from the police conduct.

[141] To properly weigh a concept of good faith one must first understand that good faith and bad faith are terms of art in the section 24(2) weighing process. The absence of bad faith is not to be equated with good faith. Nor is the absence of good faith something that is to be equated with bad faith. Instead to fall at either end of the spectrum requires the state actor to possess a particular mental state at the time of the breach. In order to commit a ***Charter*** breach in good faith the officer involved must have had an honest and reasonably held belief that he or she was authorized to act in the manner in which they did. If the belief is not honest the error cannot be said to have been committed in good faith. If the belief is honest but not reasonably held, it too cannot be said to have been committed in good faith.

[142] In many cases the term good faith has been incorrectly used as a label for other explanations that could lessen the seriousness of a ***Charter*** violation. For example in advertence and/or urgency. However, properly understood good faith is to be treated as a category under itself. This is a view that is reflected in cases such as ***R. v. Jacoy,*** [1998] 2 S.C.R. 548 from the Supreme Court of Canada where the Court stated:

> The second set of factors concerns the seriousness of the violation. Relevant to this proof is whether the violation was committed in good faith. Whether it was

> inadvertent or of a merely technical nature. Whether it was motivated by urgency or to prevent the loss of evidence and whether the evidence could have been obtained without a ***Charter*** violation

In ***R. v. Grant*** itself the Court states:

> Extenuating circumstances such as the need to prevent the disappearance of evidence may attenuate the seriousness of police conduct that results in a ***Charter*** breach. Good faith on the part of the police will also reduce the need for the Court to dissociate itself from the police conduct. However, ignorance of ***Charter*** standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith. Wilful or flagrant disregard of the ***Charter*** by those very persons who are charged with upholding the right in question may require the Court dissociate itself from such conduct.

To make a successful claim of good faith then the state must demonstrate that it had an honest and reasonably held belief at the time the breach occurred that it was acting in accordance with the law. If the belief is not honest it cannot be held in good faith. If the belief is honest but not reasonably held it can likewise not be said to have been committed in good faith.

GOOD FAITH

[143] The Officer here was aware that there was a program for sharing prescription records for narcotic script. This would not be shocking as this was a highly regulated field. He had learned of this program during the course of his employment working on drug cases. He had previously used the program successfully, successfully in the sense that he had received the requested records

on prior occasions. At one point in time a program staffer at prescription monitoring had Constable Vincent change the form he was using to an up-dated or revised form. This would tend to support his supposition that he was complying with the appropriate procedure. It was evident to me, and I find, that the Officer did not believe he violated the accused's ***Charter of Rights***. I find that he was not being willfully blind to any such possibility. ***R. v. Grant*** states at paragraph 124:

> Good faith can be identified where the police acted in accordance with what they believed to be "legitimate policing policies".

There are parallels here as noted, in my view, to the analysis and conclusions in the ***Mahmood*** and ***Habib*** cases previously discussed.

[144] This conclusion would tend to put this violation at the low end of any findings of the ***Charter*** violations in all the circumstances given the highly regulated nature of the sphere of activity, the manner in which the search was conducted and the belief of the Officer that he was acting in accordance with proper investigatory procedure.

IMPACT ON INTERESTS OF ACCUSED

[145] With respect to the second part of the analysis, this being the impact on the ***Charter*** protected interests of the accused, the Applicant would argue that as medical information any violation was of serious and substantial impact.

[146] The Respondent would say, once again, the highly regulated sphere of this activity would tend to lower the expectation of privacy. It was not, for instance, a bodily search or even a search of a home which attracts, obviously, the highest expectation of privacy. This was a search of information maintained off site. The search was not conducted in a way that humiliated, demeaned or intimidated the Applicant. All that being said, it would be an unusual case which did not have this factor favouring, if only narrowly, exclusion in the Applicant's interests. This would be the case in this instance as well. There was a violation of the privacy right which impacted on the Applicant's protected interests, albeit in a sphere where the privacy interest was lessened.

SOCIETY'S INTEREST IN AN ADJUDICATION ON THE MERITS

[147] It has been said that in general society seeks that allegations of criminal conduct be evaluated and determined on the merits. However, this must always be

balanced against the need to have a system which determines allegations without doing so in a way that undermines the ultimate or long term integrity of the system. Case law directs that the reliability and unreliability of the evidence may be weighed together with the nature and seriousness of the offence. The Courts in Nova Scotia have consistently recognized the seriousness of the issue of diversion of prescription narcotics into the illegal market. This factor would tend to favour not exercising discretion to exclude the seized evidence.

BALANCING EXERCISE

[148] As was stated in ***R. v. Harrison***, [2009] SCC 34, the balancing exercise mandated by s.24(2) is a qualitative one not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance to determine whether having regard to all the circumstances admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from any police misconduct does not always trump the truth seeking interest of the criminal justice system. Nor is the converse true. In all cases it is long term repute of the administration of justice that must be assessed.

[149] When balancing the factors relevant to this 24(2) analysis, the Court is to weigh the various factors which point to and away from the admission with the purpose of determining whether or not a reasonable person informed of all the relevant circumstances and values underlying the ***Charter*** would conclude that the admission of evidence in the proceeding would bring the administration of justice into disrepute.

[150] In this case the critical factors on the balancing exercise appear very similar to the balancing engaged in ***R. v. Habib***. The material obtained was reliable and necessary. It was informational as opposed to conscripted bodily substances obtained by a violation of bodily integrity. It was not the product of conduct which was flagrant or egregious. I am satisfied in all the circumstances the balancing exercise demanded by s.24(2) does not favour the exclusion of the evidence.

[151] Accordingly, the application is dismissed.

[152] The following observations, however, are warranted.

DISCLOSURE OF PRESCRIPTION MONITORING DATA

[153] The manner in which the PMP was operated in this instance is not the way it ought to operate under the statue. The program administrators, if they were

operating under a misapprehension as to the disclosure process, ought now be disabused of this and take steps to address deficiencies in the process. To the extent the police in this case were operating in good faith in seeking the records based on the existing process, they would now be on notice that this would not to be the case going forward.

CLOSING REMARKS

[154] I thank all counsel for their submissions.

Hunt, J.