“Court accepts argument that warrant to search client’s condo should not have been issued and client’s rights were breached” [COMMENTS BY RICHARD NEARY]

File No: 148697-1
Registry: Victoria

In the Provincial Court of British Columbia

REGINA

v.

J P

RULING ON VOIR DIRE RE VALIDITY OF WARRANT OF
THE HONOURABLE JUDGE A.J. PALMER

Crown Counsel: M. Loda Defence
Counsel: R. Neary Place of Hearing: Victoria, B.C.
Date of Judgment: July 28, 2011

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[1] THE COURT: Mr. P_____ is charged with possession of

cocaine for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act.

[2] On November 23rd, 2006, Mr. P_____'s residence at 402A -

3000 Oak Street in Chemainus, British Columbia, was searched

by RCMP members under the authority of a search warrant issued by telecommunication pursuant to s. 11 of the Controlled Drugs and Substances Act and s. 487.1 of the Criminal Code.

[3] Mr. Neary, on behalf of Mr. P_____, argues that the search warrant was invalid and that the search was unreasonable and in breach of s. 8 of the Charter. He advances two main arguments: first, that the ITO, that is, the information to obtain, is so defective in its content on a facial validity review that it could not support the issuance of a search warrant. He submits that there is insufficient detail in the ITO to positively identify Mr. P_____ as the subject and that
there is a complete absence of information and belief that any material supporting a criminal charge would be found within
the residence to be searched.

[4] Secondly, he submits that because the warrant itself displays the wrong and perhaps nonexistent address of the place to be searched, that the warrant itself is fatally flawed and must be declared void.

[5] Dealing with the last argument first, it is clear on the evidence that Mr. P_____, at the material time, resided at 402A
- 3000 Oak Street in Chemainus, British Columbia. There are

references in the ITO that clearly link Mr. P_____ to that address.

[6] The search warrant issued November 22nd, 2006, gives the ITO affiant and other peace officers authority to enter # # O Street, Chemainus, British Columbia. In fact, on November 23rd, a team of RCMP officers did enter and search the residence of Mr. P_____ at # # O Street in Chemainus. No officer apparently noticed until recently that the address on the face of the warrant omitted the civic street address.

[7] Mr. Neary argues that the error is fatal, and Ms. Loda argues that it is merely a typographical error and should not render the warrant void in these circumstances.

[8] Section 487(1) of the Criminal Code allows a justice to authorize the search of a "building, receptacle or place" where the justice is satisfied that there are reasonable grounds to believe there is evidence with respect to the commission of an offence in that "building, receptacle or place."

[9] The test for a telecommunication warrant under s. 487.1

is the same.

[10] Search warrants have been an integral part of crime investigation literally for centuries in our system of law. While they are merely pieces of paper, in the hands of investigating police officers they are powerful instruments that allow state intrusion into the sanctity of one's private domicile or place of business, most often without notice or advance warning.

[11] The importance of a properly authorized warrant to gain access to such places cannot be overstated. This has been recognized and commented upon in countless decisions of our courts. But in order to prevent the abuse of power by state agents or even the potential for such abuse, the standards for issuance and execution of warrants must be very high. The proper groundwork must be laid to justify such otherwise unlawful intrusion, and the warrants themselves must be fastidiously complete and accurate.

[12] So in the case before me, I must consider the effect and potential effect of an error in the description of the place to be searched on the face of the warrant. The officers engaged in the execution of the warrant do not, in most cases, scrutinize the ITO. They operate upon the words printed on

the piece of paper they hold in their hands.

[13] Ms. Loda argues that the warrant did not list the wrong address; it only omitted the civic street address. There is no evidence before me as to the length of Oak Street and whether there is a 400-block. I do not know. So while I
accept that it only omitted the street address, I am unable to agree that it did not list the wrong address. With respect, that is a distinction without a difference. The address is clearly incorrect and I find potentially misleading.

[14) Nonetheless, Ms. Loda submits that the typographical error, and Mr. Neary concedes that it was that, is only a technical error and that in any event, the search was validated by the entry into Mr. P_____'s actual residence based on other information in the possession of police resulting from surveillance and prior dealings with Mr. P_____: see, for example, R. v. Steptoe, February 9, 1998, Windsor Ontario
Court, General Division, where the street address numbers were

transposed, that is, 3446 instead of 3436 Sandwich Street, as a result of a typographical error, but police did enter the residence of Mr. Steptoe as specified on the warrant. The officers were unaware of the error, and it was described as
one of "absolutely no significance" since the incorrect number

was termed "redundant" by Ouellette J. at page 4 of that decision.

[15) But in my respectful view, this reasoning ignores the critical nature of detail in a document that permits police access, without warning, into the sanctity of a dwelling house. In that case, the court heard evidence on the application from the officers who entered the residence, all of whom were under no misapprehension as to the actual residence of Mr. Steptoe.

[16) In R. v. Charles, 2010 QCCQ 9178, Mascia J.C.Q., took a different view and stated:

Given the zealous protection of privacy interests in the sanctity of one's home, it stands to reason that a warrant that designates the wrong address will be invalidated.
That is found at paragraph 24 of the Charles decision. [17) In particular, and pertinent to the case at bar, the

learned justice emphasized that the importance of specifying the civic number in cases of multiple-unit buildings "is to reduce the mistaken searches of innocent places and to avoid warrants becoming an instrument of abuse by the police," and that is at paragraph 28.

[18) But the court in Charles considered and adopted a pragmatic approach used in American cases and concluded that a "technically wrong address does not invalidate a warrant if it

otherwise describes the premises with sufficient particularity so that the police can ascertain and identify the place to be searched," and that is at paragraph 37.

[19] By implication and reference to R. v. Sparkes, 2006 NLCA

6, which was similar on its facts to Charles, this approach would depend upon prior knowledge by the police of the residence: see paragraph 34 of that decision. But in my view, this line of authority conflicts with another series of cases that specifies that the court can only look at the face of the warrant and not take into account any evidence of officers with respect to prior knowledge of the residence, as in the case at bar.

[20] In R. v. Nickason, [2004] B.C.J. No. 1287, a decision of this court, my brother Judge Blake concluded that an incorrect address renders a warrant fatally defective. Nickason was a case where the name of the municipality was inadvertently omitted, although there was never any doubt in the mind of the investigator as to the actual property to be searched.

[21] Citing R. v. McAvoy (1971), 12 CRNS 56 (NWT Terr. Ct.), Judge Blake reiterated that "the rationale for requiring specificity of location on the face of a warrant is to avoid warrants becoming an instrument of abuse" and "the best way to protect that principle is to ensure that any person who is

authorized to execute the warrant should, by looking at the warrant itself, be able to obtain a reasonably precise conception of the place which is to be searched," and that is at paragraph 11.

[22] In making this statement, the court relied on R. v.• Parent, [1989] Y.J. No. 15, wherein the British Columbia Court of Appeal, sitting as the Court of Appeal for the Yukon Territory, stated that in making this determination, the court is confined to a consideration of the face of the warrant and the information contained therein. One cannot look at the more accurate information in the ITO, the prior knowledge of the location of Mr. P_____'s residence, or the fact that the search was carried out at the suspect's real address.

[23] In Parent, the Court of Appeal rejected the notion that the failure to accurately specify the address to be searched is not an "inconsequential defect in form or a misspelling or trivial error" but, rather, renders the warrant invalid and "so fundamental as to render the document of no effect." Specifically, Locke J.A. said:

[T]he validity of the warrant is not to be tested either by the results or manner of execution, but by the circumstances at the time of authorisation.

That is at page 9 of the Parent decision.

[24] Nickason is not binding on this court except by convention. Nonetheless, I accept its reasoning and conclusion as reasonable and in accordance with legal principles.

[25] The decision of the British Columbia Court of Appeal in Parent is binding upon this court. It means, in my opinion, that a search warrant must be able to stand on its own. This means that "any person," and that was the phrase used by Judge Blake in Nickason at paragraph 11, any person looking at the warrant should be able to determine by the information printed on its face a description of the place to be searched.

[26] Ms. Loda argues that Nickason and Parent are distinguishable and that in those cases the property to be searched was not associated to any person by name, unlike Steptoe and the case before me. But in those cases, that was a non-issue as in both cases a search was carried out and there was no confusion as to the intended location.
Obviously, there was prior knowledge by the officers involved

as to the actual location. Nonetheless, the court in both cases found the absence of a correct address on its face invalidated the warrant.

[27] So applying this principle, I am confined in my deliberations to the face of the warrant in the case before

me. It is incorrect and omits the civic street address, a fundamental part of the address of a multi-residential building. There is no evidence of any of the search team noticing the error or attempting to correct it prior to the search being carried out. This could have been done through the authority of the issuing justice during the 11-hour period that the warrant was valid.

[28) It is an invalid warrant, in my opinion, and may not be validated by consideration of the information already in the knowledge of the officers or retrospective consideration of the actual search.

[29) I turn now to the ITO.

[30) The test on review of the validity of a search warrant is to determine whether the material filed in support of it
could, not would, support the issuance of a warrant: see R. v. Garofoli, [1990) 2 S.C.R. 1421 at page 1452; R. v. Bacon,
2010 BCCA 135 at paragraph 25; and R. v. Wilson, [2011) B.C.J. No. 965 (B.C.C.A.) at paragraph 37.

[31) Where the affiant of the ITO testifies, then the court may consider whether the evidence, as amplified or enlarged, could support the issuance. Alternatively, the court is confined in its deliberations to the face of the ITO and there

is no amplified record. This is referred to as a facial validity review, but the test is the same: see R. v. Wilson at paragraph 39. It is this latter form of review upon which the court is embarking in this case.

[32] On a review, the court does not substitute its opinion, and the threshold is a relatively low one. Does the ITO disclose reasonable grounds upon which the warrant could properly have been used based upon a subjective and an objective standard?

[33] In the ITO, the affiant deposes that he has reasonable grounds to believe and does believe not only that the subject is involved in a criminal offence but also that a search of a specified place such as a residence or vehicle will afford evidence of such criminal activity. So it follows that the ITO must contain information that links the subject to criminal activity and links the place to be searched to
criminal activity. Simply affording information that supports a belief that the subject may be implicated in a crime is not sufficient to support the issuance of a warrant to search his residence unless the second part of the test is also
satisfied.

[34] The belief must be based upon facts asserted in the ITO, not just opinions without any source or origin attributed to

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them: see Re Criminal Code, [1997] O.J. No. 4393 (Ont. C.J. Gen. Div.) at paragraph 8.

[35] In the ITO, the affiant, Constable Helgesen, asserts that he has reasonable grounds to believe and does believe that certain items relating to certain offences under the CDSA will be found at the residence of Mr. P_____. The list of items to
be searched for is contained in Appendix A and includes drug

related items, including illegal substances, and a multitude

of seemingly legal and innocuous items, such as rent receipts, addressed envelopes, personal computers, cell phones, tax returns, credit card statements, and the like.

[36] I have reviewed the ITO specifically as it relates to Mr. P_____, keeping in mind that it also refers to other suspects such as J C and J T and T R.
Mr. P_____ is mentioned or referred to in 29 paragraphs out of a total of 113 relating to the investigation E-Patio in which
Mr. P_____ was a target. At least eight paragraphs are informative only as to Mr. P_____'s identity or description: see, for example, paragraphs 14, 17, 18, 19, and 20.

[37] A close reading of some paragraphs reveals that if I accept the affiant's interpretations of jargon and code used by cocaine traffickers, as well as other suppositions, Mr. P_____ may be implicated in some criminal activity at least by

his association and interaction with J T and J C and T R. But while I am satisfied that there is evidence linking Mr. P_____ to the Oak Street, Chemainus address, there is not a single statement that links
any such activity to this residence or supports any reasonable

belief that crime-related items may be found there or in his vehicle.

[38] For example, in paragraphs 74-78, there is intercepted communication between Mr. P_____ and J T. Mr. P_____ is not put at any location. It is alleged that the contact was made by text messaging. The sum total of that communication, if I accept that the terms soft and hard refer to powder and crack cocaine respectively, is that Mr. T asks Mr. P_____
if he can trade some cocaine, and Mr. P_____ responds that he does not have any and is heading for Mr. T's residence.

[39] In paragraph 78, Constable Helgesen sums it up by saying:

I believe that P advised T that he does not have any crack cocaine available and that he would attend T' location.

Such a belief can hardly be suggested that items of criminal activity may be found inside Mr. P_____'s residence.

[40] According to paragraph 79, about a half-hour later Mr. P_____ was seen at Mr. T's residence.

[41] In paragraph 84, the evidence is that T R was at Mr. P_____'s residence and then they left together and returned a short time later. No suspicious activity is reported.

[42] Paragraphs 92 through 108 refer to intercepted communications among P_____, T, and C that, depending on interpretation, may be considered suspicious and likely drug-related, but here again, no evidence in those paragraphs
is in any way suggestive that crime-related items may be found in Mr. P_____'s residence.

[43] Unlike other targets of the project, there is no basis explained for the conclusion that the person alleged to be Mr. P_____ in text and cell phone communication is, in fact, him. There is no basis stated for the conclusion that the cell
phone number 732-3395 attributed to Mr. P_____ in paragraph 22 is, in fact, his. The other number, 250-709-7195, may be attributed to him in paragraph 83 when the caller to Bell Mobility states his address as being the same as the one I now know to be that of Mr. P_____.

[44] Ms. Loda submits that while there is no direct evidence in the ITO of illicit drugs being held at Mr. P_____'s residence, where a person is implicated in drug trafficking,
it stands to reason that other items listed in Appendix A will

be found there and support this officer's beliefs.

[45] While it may be logical to assume that rent receipts or credit card statements may be in his residence, so may they be found in anyone's residence, and there is no evidence whatsoever that suggests those items are there in relation to illegal activity.

[46] On that basis, where a person is arrested in a single street-level drug transaction, one could submit that they must have illegal or crime-related items in their residence, thus authorizing a search even where there is no apparent link between their activities and the residence. That is faulty logic, in my respectful view.

[47] Ms. Loda argues that at the very least they should be able to look for his cell phone or Blackberry. First, since they are portable devices, there is no basis to conclude they were being used in his residence, and according to the ITO, the police already knew his cell numbers. In that case, it would seem unnecessary to search his residence to locate the cell phone or Blackberry he apparently carried with him. So one might wonder why it would be necessary to obtain a search warrant to find them there.

[48] In my opinion, Appendix A is merely a boilerplate

attachment to the warrant, and the ITO is deficient in that it does not link any of the items listed there to Mr. P_____'s involvement in drug trafficking or his residence by implication or otherwise.

[49] In R. v. Biscoe, File 28852-1 of Duncan Registry, a decision of this court on March 8th, 2007, my brother Judge Smith dealt with a situation where there was evidence supplied that a power diversion was taking place inside a building. He
stated:

It is fundamental, in my opinion, that to obtain such a warrant there must be evidence to indicate
the grounds why the officer believed the offence was occurring within the residence or the outbuildings.

That is at paragraph 2, and that the police:

. . . have to . . . place before the authorizing justice or judge information that allows there to be a determination as to whether their grounds do or do not exist with respect to the alleged offence occurring within the location sought to be searched.

That is at paragraph 3.

[50] I agree with those statements.

[51] I note also in paragraph 14(c) that Constable Helgesen deposes that Mr. P_____'s address on his vehicle registration should read "# # O Street, Chemainus," probably explaining the source of the deficient address in the warrant itself.

[52] For all of these reasons, I am of the view that the ITO is so seriously flawed that it fails the facial validity test and that on a close, considered reading of it, a warrant could not be authorized for the search of Mr. P_____'s residence.

[53] For all of these reasons, the warrant is invalid and the search conducted on November 23rd, 2006, was warrantless and therefore prima facie unreasonable. No argument has been advanced otherwise as to the reasonableness of the search, so it must be concluded that it was conducted in breach of Mr. P_____'s s. 8 Charter rights.

(RULING CONCLUDED BELOW)

“Ruling that as a result of breaches of client’s rights in connection with unlawful search of condo, 1.5 kg of cocaine found in condo should be excluded from case. Client acquitted.” [COMMENTS BY RICHARD NEARY]

File No: 148697-1
Registry: Victoria

In the Provincial Court of British Columbia

REGINA

v.

J P

REASONS FOR JUDGMENT OF
THE HONOURABLE JUDGE A.J. PALMER

Crown Counsel: T. Corsi (as Agent forM. Loda) Defence Counsel: R. Neary Place of Hearing: Victoria, B.C.
Date of Judgment: August 19, 2011

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[1] THE COURT: On July 28th, 2011, in the course of a voir dire, I ruled that the search warrant was void on its face for a technical irregularity, that it was unsupported by the ITO, and that the search of Mr. P_____'s residence under its
authority was unreasonable and in breach of his s. 8 Charter

rights.

[2] At the conclusion of the voir dire, counsel then argued the s. 24(2) issue pertaining to admissibility of the evidence seized in the search.

[3] I will deal first of all with the facts.

[4] On November 23rd, 2006, at 6 a.m., pursuant to a search warrant issued the previous day to RCMP Constable Donald Helgesen, all members of the team assigned to execute the warrant met for a briefing at the Duncan RCMP detachment. The team included two ERT (that is emergency response team) members to employ a hard entry made with force and no advance notice or warning to the occupant, Mr. P_____.

[5] The briefing was conducted by Corporal Brian Paul, who had made the decision about the manner of search, and the search team was led by Corporal Marty Stoner. Both officers have extensive experience each in excess of 20 years' service.

[6] Three searches were conducted simultaneously that morning

at separate residences as part of an ongoing drug-trafficking investigation started in 2005 and named E-Patio. Corporal
Paul was the lead investigator on this project and responsible

for decision-making, target identification, investigatory methods, designating search sites, and determining manner of search. Corporal Paul did not attend any of the search sites.

[7] At the entrance to Mr. P_____'s residence, the ERT members used a ram to break the door, announced their presence and purpose as they entered with weapons drawn and immediately subdued Mr. P_____, who had been in bed. The rest of the team entered behind the ERT members, and Mr. P_____ was arrested and handcuffed by Constable DeFrane, who advised him of the reason for arrest and provided him with hiss. IO(b) Charter rights and his right to silence. He was apparently shown the search warrant as the purpose of the search was explained to him.

[8] By all accounts, Mr. P_____ was cooperative and compliant throughout.

[9] Once the search site was under control, the ERT members left after about five minutes and the rest of the members conducted the search. As the search commenced in the presence of Mr. P_____ in his bedroom, he spontaneously pointed out a sum of cash on the closet shelf, and a bundle of bills totalling
$6,500 was located and seized.

[10] Among the other items located and seized were two digital scales containing white residue later analyzed as cocaine, a cooking pot containing 33.9 grams of partially cooked cocaine, numerous personal documents, and a sealed bag containing 389.5 grams of cocaine. Later, after the occupant and all but two members of the search team had left, another bag containing 978.8 grams of cocaine was located. All items seized were

turned over to Constable Frank Horvath, the designated exhibit officer on scene, and then Constable Sean Davey, the exhibit custodian.

[11] All items were identified and marked on the voir dire. Continuity was not contested. Several items, including personal documents, sealer bags, and the bundle of cash, were returned to Mr. P_____ in 2007.

[12] On December 19th, 2006, although not authorized by the warrant, Mr. P_____'s Chrysler 300 vehicle was seized from a location other than his residence, and this was returned to him on June 13th, 2007.

[13] Dealing now with the issues.

[14] The main issue on the voir dire on as. 24(2) analysis is the admissibility of the obviously incriminating evidence. No issue was taken by the defence with respect to the analysis of

the cocaine. It was also conceded that it is of sufficient quantity to constitute possession for the purpose of trafficking.

[15] The determination of the admissibility under s. 24(2) of the Charter requires the court to embark on an analysis under the three categories and criteria established in R. v. Grant, [2009] S.C.J. No. 32, which states as follows:

When faced with an application for exclusion under
s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in
the justice system having regard to: (1) the
seriousness of the CharterDinfringing state conduct, (2) the impact of the breach on the
CharterDprotected interests of the accused, and (3)

society's interest in the adjudication of the case
on its merits.

That is from the headnote of that case at page 5.

[16] The objective inquiry is to determine if the overall repute of the justice system, viewed in the long term, will be adversely affected by the admission of the evidence, and that is from Grant at paragraph 68.

[17] The finding of a breach means that damage has already

been done to the administration of justice, and s. 24(2) seeks to ensure that evidence obtained through the breach does not
do further damage, and that is from Grant at paragraph 69.

[18] Section 24(2) is not aimed at punishing state misconduct

but, rather, is focussed on the broad impact of admission of evidence on the long-term repute of the administration of justice, and that is from Grant at paragraph 70.

[19] In addition to the facts upon which I based my previous ruling, Mr. Neary submits three further issues for the court's consideration, all going to the first criteria, the seriousness of the breach.

[20] First, he submits that the affiant on the ITO and recipient of the search authorization was required to be present to conduct the actual search. It is beyond dispute that Constable Helgesen was not present. Mr. Neary submits that this is indicative of the ongoing pattern of disregard for Mr. P_____'s Charter rights.

[21] Secondly, he argues that the hard entry into his client's residence was not necessary as there was no basis for any fear that violence or destruction of evidence was likely. This no-knock policy, he says, simply aggravated an already unlawful search.

[22] Finally, he says that as a further indication of the ongoing Charter-infringing conduct, the seizure of Mr. P_____'s vehicle and its detention for seven months without any authorization is a further aggravating factor to consider.

[23] Turning now to the first criteria, the seriousness of the breach.

[24] Under this heading, the court must consider the seriousness of state misconduct on a spectrum ranging from inadvertent or minor violations to wilful or reckless disregard of Charter rights, and that is found in Grant at paragraph 74. The court must consider whether the breach is so serious that the court should dissociate itself from that conduct by excluding the evidence, and that is Grant at paragraph 72, and a case called R. v. Harrison, [2009] 2
S.C.R. 494, which was released the same date as Grant, and that is in paragraph 22.

[25] I have already found that the search warrant was defective on its face, and based upon a close, considered reading of the ITO, it could not have supported the issuance of a warrant. I found that the ITO provided no basis whatsoever for any reasonable belief that incriminating evidence could have been found at Mr. P_____'s residence. On this basis alone, I must conclude that the warrantless search of the residence constituted a breach at the serious end of the spectrum.

[26] Consideration of the success of the search in hindsight does not lessen the seriousness. While, like in Harrison, I

do not consider the affiant's conduct to be deliberate in the sense of a deliberate attempt to mislead the justice, I do find on the evidence that because Mr. P_____ was a target in a wide-ranging investigation involving other individuals, the affiant's determination to find incriminating evidence "blinded him to constitutional requirements of reasonable grounds," and that is from Harrison at paragraph 24.

[27] Where an investigation does not provide reasonable grounds for a lawful search, the breach is more serious. See R. v. Whyte, [2010] O.J. No. 1295 (Ont. S.C.J.), applying R. v. Kokesch (1990), 61 C.C.C. (3d) 207 (S.C.C.), where Mr. Justice Sopinka stated:

Where the police have nothing but suspicion and no legal way to obtain other evidence, it follows that they must leave the suspect alone, not charge ahead and obtain evidence illegally and unconstitutionally. Where they take this latter course, the Charter violation is plainly more serious that it would be otherwise, not less.

[28] While I find there was no bad faith on the part of the officers searching Mr. P_____'s residence, it was still, as I have found, a warrantless search. Mr. Neary argues that this is aggravated by the absence of Constable Helgesen, the officer to whom the authorization was issued. Ms. Loda
submits that there were, in fact, three searches being carried out simultaneously on November 23rd, 2006, and it follows that

Constable Helgesen could not be at all three places at once. There was no evidence before me as to where Constable Helgesen actually was during the search, although according to Corporal Paul, he was present at the pre-search briefing.

[29] In the case at bar, the warrant was specifically issued to Constable Donald Andrew Helgesen. It specifically authorizes "you," that is, the named officer, to enter the premises and carry out a search and seizure. It makes no mention of any other peace officers being granted such authorization, so for all intents and purposes, Constable Helgesen was the only person apparently authorized to enter Mr. P_____'s residence.

[30] In R. v. Strachan, [1988] 2 S.C.R. 980, it was concluded that the person named in the search warrant must be present during the search to "be responsible for the way the search is carried out," and that is at paragraph 28. In that case, at paragraph 28, the Supreme Court of Canada differentiated between warrant provisions in the Narcotic Control Act and the Criminal Code where there is no naming requirement.

[31] Chief Justice Dickson (as he was then) concluded that the naming requirement ins. 10(2) of the Narcotic Control Act was intended to counterbalance the wider scope of the Code-authorized warrant: see also R. v. Genest, [1989] 1 S.C.R. 59

at paragraph 45-46.

[32] Strachan and Genest were decided under the Narcotic Control Act, R.S.C. 1970, c. N-1. In particular, s. 10(2) specified that a warrant may be issued that authorizes "a peace officer named therein" to search designated premises. The Narcotic Control Act was replaced by the Controlled Drugs and Substances Act, R.S.C. 1996, c. 19 (referred to as the "CDSA"). Section 11(1) refers to "warrant authorizing a peace

officer to search a place." There is no provision restricting the search to a named officer. So the question pertinent to the case at bar is, Is an officer named in a CDSA warrant required to be present during the search even where the Act does not require such specificity?

[33] My brother Judge Blake dealt with a similar and related issue in R. v. Nickason, [2004] B.C.J. No. 1927, in respect of a warrant issued under the Prevention of Cruelty to Animals Act. In that case involving a search on a rural farm
property, the issue was whether persons not specifically named

could be in attendance during the search. The court concluded that it was permissible so long as they operated under the supervision of the person actually named, and that is in paragraph 16. For this conclusion, Judge Blake relied on the pre-CDSA cases, including Strachan.

[34] However, the court, after acknowledging that the issue was not fully argued in respect of the different forms of prescribed warrants, that is, those authorizing specifically named persons and those that authorize a broadly defined group of people, concluded that "the rationale of the cases to which [he] was referred would seem to apply equally to the case before [him]," and that is in paragraph 17 of Nickason.

[35] In my view, applying his words in paragraph 16, the rationale he endorses refers not only to unnamed persons being permitted to assist in the search but also to the requirement for supervision by the person named. This would accord with
my reading of Strachan at paragraph 29 where Chief Justice

Dickson explained:

This requirement [that is, for supervision] is met when the officer or officers named in the warrant execute it personally and are responsible for the control and conduct of the search. The use of unnamed assistants in the search does not violate
the requirement of s. 10(2) [of the Narcotic Control Act] so long as they are closely supervised by the named officer or officers. It is the named officers
who must set out the general course of the search and direct the conduct of any assistants. If the named officers are truly in control, participate in the search, and are present throughout, then the use of assistants does not invalidate the search or the warrant.

[36] The reasoning and logic employed in these cases is

-persuasive, and in my view, the answer to the question is yes, so while there would appear to be no restriction on the

attendance and assistance of Corporal Stoner and his team, it is significant that the actual officer authorized to search was not present. Even Corporal Paul, the head of the E-Patio investigation and the central decision-maker, was not present as Constable Helgesen's delegate for direct supervision.

[37] While I appreciate that there were three searches going on at the same time for strategic reasons, there is no evidence that Constable Helgesen was present at any of them. It would not seem unreasonable to expect that he would attend
the briefings and make an appearance at all searches conducted that day so long as he participated in the direction and supervision of the officers who did enter the premises.

[38) Unlike other cases dealing with this issue, this finding does not invalidate the warrant or the search. I have already done that for other reasons. But I accept Mr. Neary's submission that it may be used to enhance the seriousness of the breach in the execution phase of the search as part of the Grant analysis.

[39) The hard entry explained in evidence and justified by the attending officers is one that the defence submits I ought to consider as further unnecessary excessive conduct that renders the breach even more serious. Every case must depend on its own particular circumstances, and while there is an onus on

police to explain the reasons for a no-knock entry, this court must "balance the rights of suspects with the requirements of safe and effective law enforcement," and that is from R. v. Cornell, [2010] 2 S.C.R. 142 at paragraphs 20 and 24, a case similar to the case at bar on its facts.

[40] I have already found the search to be unreasonable for other reasons, but when determining the appropriateness of the hard entry, I am considering information contained in the ITO as well as other viva voce evidence from participating officers.

[41] While the ITO does not reveal any episodes of violence among the E-Patio targets, it is clear that there is evidence of trafficking in relatively large quantities of cocaine and evident that Mr. P_____ is associated with the drug-trafficking network allegedly operated by J C____: see, for example, paragraph 109 of the ITO.

[42] I can take judicial notice of the fact that violence among hard-drug traffickers and between traffickers and their debtors is prevalent. It is common knowledge that weapons are often carried and occasionally used by traffickers to protect themselves and their valuable product and to enforce debt collection.

[43) Corporal Paul explained that J C____ was believed to be involved in multi-kilo cocaine trafficking and that in his experience, cocaine traffickers at this level often have guns. Source intelligence had satisfied him that these targets had access to guns. J T_____, for example, had apparently assaulted his girlfriend with a taser. He also explained that cocaine, being water-soluble, it could easily and quickly be flushed away if the occupant was notified that the police were at the door. In addition, he advised of situations where
other traffickers have dressed in police uniforms in order to

effect a drug rip, that is, a theft of drugs and/or money from a residence.

[44] Corporal Paul denied that it was his practice to direct a no-knock entry for every cocaine case. While he acknowledged no direct evidence of Mr. P_____ being a violent person or having weapons in his residence, he made it clear that surveillance and intelligence reports persuaded him that a no knock entry was the correct decision in this case.

[45) Constable Nguyen, who was part of the search team, testified that he had had previously dealings with Mr. P_____ and was aware of his association with others in a group involved in violence and intimidation in bars.

[46) Constable Kelly Falconer, one of the two ERT members

involved in this entry, entered the residence first under the direction of Corporal Stoner. The decision to use ERT members was made by Corporal Paul. Constable Falconer and his ERT partner were dressed in standard black body armour and attire, including balaclavas. A ram was used on the door, and both entered shouting "police, search warrant" and immediately took Mr. P_____ under control before the other team members entered. For protection, he said, his gun was drawn.

[47] Constable Falconer described his role as gaining entry quickly, ensuring officer safety, securing the residence, and leaving when it was complete. In fact, Constable Falconer and his ERT partner were inside the residence less than• five minutes and never touched Mr. P_____. The entry and securing of the residence was done efficiently and safely for all involved, including Mr. P_____.

[48] It is telling, in my view, that Mr. P_____ was described as being cooperative and even congenial. Minimal damage was
done, no one was harmed, and incriminating evidence was found

and seized.

[49] It may be easy to second-guess police tactics in hindsight after a quick and successful hard entry, perhaps suggesting it was not necessary, and that is the Monday morning quarterback referred to in Cornell at paragraph 24.

But courts should be careful to carry out the required balancing while allowing law enforcement officers a degree of latitude in making their own tactical decisions. Officer safety is a relevant and significant factor to consider and ought not to be brushed aside hastily by a reviewing court.

[50] None of the explanations for this entry were fanciful or baseless. Surely, officer safety and preservation of evidence are required elements of entry into unknown situations where police officers may be confronted with violence. Even the pointing of a gun at the occupant to ensure prompt compliance in situations such as this is not, in my opinion, inappropriate.

[51] It must be remembered, too, that E-Patio was a long investigation that started in 2005 with a growing number of identified targets and included eight intercept
authorizations, multiple general warrants, and over 240 search

warrants. It is fair to assume that a lot of information had been gathered and considered by the investigators by the time the search of Mr. P_____'s residence was conducted in November of 2006.

[52] As Mr. Justice Cromwell stated for the majority in

Cornell at paragraph 24:

[T]he police must be allowed a certain amount of latitude in the manner in which they decide to enter premises. They cannot be expected to measure in advance with nuanced precision the amount of force the situation will require.

[53] He went on to describe after-the-fact assessments as being "unfair and inappropriate" when applied to situations where "the officers must exercise discretion and judgment in difficult and fluid circumstances," and that is found in paragraph 24 of the Cornell decision; see also R. v. Chuhaniuk, 2010 BCCA 403 at paragraph 58.

[54] The police need only show reasonable grounds for their decision and the threshold must necessarily be a low one. In my view, the Crown has laid the required evidentiary basis for the decision to use a forceful entry into Mr. P_____'s
residence, and I am not persuaded that it aggravates the

seriousness of the breach in this case.

[55] Turning now to the unauthorized seizure of Mr. P_____'s vehicle.

[56] The search warrant authorized a search of his vehicle but not its seizure. It was apparently seized from an auto- detailing shop almost four weeks after the search and returned some seven months later. The search warrant expired at 6 p.m. on November 23rd, 2006, so the seizure of his vehicle was

unauthorized and unlawful. The Crown concedes this point. In my opinion, this does aggravate the seriousness of the breach of Mr. P_____'s s. 8 Charter rights in the execution phase.

[57] All in all, for all of the foregoing reasons, I am of the view that the breach in question is at the most serious end of the spectrum referred to in Grant.

[58] Turning now to the impact of the breach on the protected interests of the accused.

[59] This inquiry focuses on the seriousness of the impact of the Charter breach on the constitutionally protected interests of the accused and may range from "fleeting and technical to profoundly intrusive," and that is in Grant at paragraph 76. Simply put, the more serious the impact, the greater the risk that the admission of the evidence would bring the administration of justice into disrepute, and that is in Grant at paragraph 77.

[60] The search of a dwelling is second only to body searches on the scale of intrusiveness: see R. v. Wong, 2010 BCCA 160 at paragraph 7. A person's expectation of privacy inside his or her own home is at its highest where there should be
freedom from unauthorized state intrusion. A person's home is

a final refuge and a safe haven: see Cornell at paragraph

145, citing R. v. Silveira, [1995] 2 S.C.R. 297 at paragraph

41.

[61] "An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy ...is more serious than one that does not," and

that is from Grant, paragraph 78 and paragraph 113.

[62] For all the reasons previously discussed, I find the impact on Mr. P_____'s Charter-protected interests to be at the serious end of the spectrum.

[63] Turning now to the third criteria in Grant, society's interest in adjudication on its merits.

[64] It is apparent in this case that the exclusion of the evidence will effectively gut the Crown's case. That is an important factor to consider. While it would seem reasonable, even likely, that society's immediate reaction would be negative, the law is clear that this analysis focuses on the long-term effect on the repute of the justice system.

[65] Where persons are found in possession of large quantities of illegal drugs that contribute to many of society's ills, it is natural for the citizenry to demand serious sanctions. Society may react negatively to exclusion of incriminating evidence and the consequent acquittal. But on a long-term

basis, will the repute of the justice system suffer if state agents are permitted to enter a person's private residence and seize personal property without proper authority to do so, and will this be seen as an endorsement of that conduct?

[66] Society's interest cuts both ways. While the evidence is virtually conclusive of guilt and the charge a serious one, this factor "should not take on disproportionate significance," and that is from Harrison at paragraph 34.

Similarly, while society has a heightened interest in seeing serious charges tried on their merits, so does society have an interest in a justice system and state conduct that is above reproach, and that is from Harrison at paragraph 34.

[67) Finally, I turn to balancing the factors.

[68) I do not find bad faith on the part of the police in this case. The officers who conducted the entry and search reasonably believed that they did so with proper authority. They were unaware of the defects in the ITO and the warrant itself. There was no unnecessary violence. Mr. P_____ was treated with respect, as was his property. That is not to say that his Charter rights were not seriously disregarded. In my opinion, they were, and the intrusion into the sanctity of his residence was a most serious breach.

[69] While bad faith may reinforce a decision to exclude evidence, good faith will not necessarily support its admissibility. It is but a factor to consider.

[70] The exercise must be a true balancing. In other words, doubt does not favour admission of evidence nor is the reverse true. The court must arrive at a conclusion merited by a weighing of all of the factors. This balancing is necessary because while reliable evidence of a serious charge may favour admission, it is not automatic, and that is from Harrison at paragraph 40.

[71] Similarly, an unreasonable search of a dwelling house will not automatically result in exclusion of the evidence, and that is from Wong at paragraph 17.

[72] While there is no mathematical formula for this analysis, I find the reasoning and conclusion in Harrison to be most compelling.

[73] In my opinion, while society's interest in trying this case on its merits is apparent and even obvious, the court should be careful not to allow that factor to single-handedly outweigh the concerns about the long-term repute of the administration of justice. That caution must be heeded by the trial courts.

[74] Even persons harbouring dangerous substances inside their homes are entitled to Charter protection. As Chief Justice McLachlin stated at paragraph 40 in Harrison:

Charter protections must be construed so as to apply to everyone.

[75] In summary, the police entered Mr. P_____'s residence without valid authorization and in the absence of the officer actually authorized to search and far exceeded their authority by seizing and holding his vehicle for several months with no authority whatsoever to do so. To condone this conduct, even in the absence of bad faith on the part of the officers and even when considering the very real preference to have these serious charges tried on their merits, would, in my opinion, have a negative impact on society's view of the administration of justice when viewed overall and over the long term.

[76] As Chief Justice McLachlin said in Harrison at paragraph

42:

[T]he price paid by society for an acquittal in • these circumstances is outweighed by the importance of maintaining Charter standards.

[77] I have decided in these circumstances for these reasons that all of the factors favour exclusion of the evidence. There is good reason in this particular case for the court to

dissociate itself from the state conduct. In my opinion, taking all factors into account and balancing the competing rights and interests, the admission of this evidence would bring the administration of justice into disrepute, and the evidence will be excluded.

[78] Now, I have a copy of that ruling for each of counsel, and again, I caution you. I do my own typing, so you have to accept it the way it is, and it is an unofficial --

[79] MR. NEARY: Thank you very much, Your Honour.

[80] THE COURT: -- copy but it is a copy of what I just read into the record.

[81] MR. CORSI: Thank you very much, Your Honour.

[82] THE COURT: Now, Mr. Corsi, do you have any other instructions?

[83] MR. CORSI: I do, Your Honour. I have instructions to call no further evidence on this matter.

[84] THE COURT: All right. I do not need to hear from anybody. On that basis, there is no evidence here, Mr. P_____, and accordingly, the charges are dismissed. I want to just say something to you before you go.

[85] THE ACCUSED: Yes, sir.

[86] THE COURT: This acquittal is not based on a technicality. It is far more substantive than that, and I am sure you can discuss all of that with Mr. Neary. But I have to say this. It was a serious matter. If the evidence had
been admitted, I expect the Crown would have been asking for a serious sentence here. You very likely would have received a serious sentence, but nonetheless, I hope you have learned something from this. I think you have dodged a bullet here today, I will be very frank with you, Mr. P_____, and I hope you have learned something from this. But you are now free to go to.

[87] THE ACCUSED: Thank you. [88] THE COURT: All right, sir?
[89] MR. NEARY: Thank you very much, Your Honour. [90] THE COURT: All right. Thank you.
[91] MR. CORSI: Thank you. (REASONS CONCLUDED).