Citation: *R. v. Hamilton, et al.,* 2010 YKTC 75

Date: 20100728
Docket: 08-00548
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

Douglas Hamilton and Carolyn Johnson and Lorraine Foubister

Appearances:

K. C. Komosky	Counsel for Crown
E. J. Horembala	Counsel for Douglas Hamilton & Carolyn Johnson
Gordon Coffin	Counsel for Lorraine Foubister

RULING ON *VOIR DIRE*

[1] Douglas Hamilton, Carolyn Johnson and Lorraine Foubister are charged with having committed offences contrary to ss. 7 and 5(1) of the *Controlled Drugs and Substances Act* ("*CDSA*"). Mr. Hamilton is further charged with having committed offences contrary to ss. 86(1) and 91(1) of the *Criminal Code.*

Overview

[2] On October 10, 2008, Mr. Hamilton's supervisor at NorthwesTel, Gord Peterson, contacted the Whitehorse RCMP Detachment and reported that Mr. Hamilton had not shown up at work. Based upon this, and observations made by Mr. Peterson at Mr. Hamilton's Marsh Lake residence at 3 Solitude Drive (the "Residence"), he was concerned about Mr. Hamilton's well-being, and contacted the RCMP to express his concern and to inquire whether the RCMP had any information about the possibility of Mr. Hamilton having been in an accident.

[3] As a result of this phone call, Cst. Greer attended the Residence, which was also the residence of Ms. Johnson and Ms. Foubister. Cst. Greer, relying on his observations at the Residence and other information, including a telephone conversation from the Residence with Mr. Peterson, conducted a warrantless search of Mr. Hamilton's Residence and an outbuilding (the "Outbuilding"), utilizing the services of a locksmith to gain entry. Marijuana in various stages of growth and cultivation was observed during this warrantless search.

[4] As a result of information provided to him by Cst. Greer after the search, Cst. Terleski swore an Information to Obtain (the "ITO") and was issued a search warrant for the Residence and Outbuilding.

[5] Located at the scene were 183 marijuana plants, approximately 10 kg of marijuana shake and 75 grams of dried marijuana bud, bulbs, lighting material and documents, as well as two firearms.

[6] Defence counsel for Mr. Hamilton and Ms. Johnson filed an application challenging the validity of the search warrant and asking that all evidence seized as a result of the execution of the warrant be excluded from admission as evidence at trial.

[7] Defence counsel previously sought and obtained leave to cross-examine Cst. Greer in the voir dire (2010 YKTC 6). I subsequently, in an oral decision, granted defence counsel's application to cross-examine Mr. Peterson. I further granted defence counsel leave to cross-examine a neighbour of the accused, Carolynne Fujita (2010 YKTC 15).

[8] The Notice of Application sets out three grounds for challenging the validity of the search warrant. Firstly, there was no statutory authority for the warrantless search as Cst. Greer did not have any reasonable and probable grounds to believe that anything connected to an offence would be found inside the Residence or

Outbuilding. (While the Notice of Application refers only to the *Controlled Drugs and Substances Act*, the authority for a warrantless search is found in s. 487.11 of the *Code*). Crown counsel is not contesting this ground.

[9] Secondly, the warrantless search conducted by Cst. Greer was unlawful and without legal authority at common law as there were no exigent circumstances that would have justified entry in any event.

[10] Thirdly, the search warrant was issued on the basis of Cst. Greer's observations of marijuana and cultivation equipment in the Residence and Outbuilding. Defence counsel submits that if the warrantless entry was not authorized and in violation of s. 8 of the *Charter of Rights and Freedoms* (the "*Charter*"), then the observations of Cst. Greer with respect to the interior of the Residence and Outbuilding should be excised from the ITO. Without these observations, there are no reasonable grounds for the issuance of the warrant. Crown counsel concedes the latter point but takes the position that the entry into the Residence and Outbuilding was justified by the common law police duty to protect life.

Issues

[11] The issues are as follows:

1. What is the standard of review applicable to an authorizing judge's decision to grant a warrant, in particular with respect to any conclusion the authorizing judge may have reached with respect to the existence of exigent circumstances?
2. Did exigent circumstances exist so as to justify Cst. Greer's entry at common law?
3. If there was a breach of the s. 8 *Charter* right of the accused, should the evidence be excluded under s. 24(2) of the *Charter*?

Positions of the Parties

Crown

[12] Crown counsel argues that my role in reviewing the decision of the authorizing judge to issue the warrant is simply to determine, after considering the evidence heard on the *voir dire*, whether there was any basis upon which he could have granted the warrant. Counsel submits that this same standard of review applies to whether exigent circumstances existed. The role of the reviewing court is not to go behind any determination made by the authorizing judge about whether exigent circumstances existed. Here, the Crown says, it is implicit that the authorizing judge accepted there were sufficient exigent circumstances for Cst. Greer's warrantless entry, since otherwise the warrant would not have issued. Counsel submits that, even after considering some additional information and excising one paragraph in the ITO which was incorrect, the authorizing judge could have issued the warrant and, as such, I should not interfere with his decision.

[13] Crown counsel further submits that after considering all the evidence, I should find that exigent circumstances existed in any event.

[14] Crown counsel says that even were I to find that a breach of the accused's s. 8 *Charter* rights occurred, that the evidence should not be excluded.

Defence counsel

[15] Defence counsel concurs that I am only to consider whether the authorizing judge could have issued the warrant. However, counsel submits that, after considering the evidence heard in the voir dire, I should find that the authorizing judge would not have issued the warrant as exigent circumstances did not exist and, without a lawful entry into the Residence and Outbuilding, the items located within should be excised from the ITO. This would leave no basis upon which the issuing judge could have granted the warrant.

[16] Defence counsel further submits that the evidence recovered pursuant to the search should be excluded under s. 24(2) of the *Charter*.

Information to Obtain

[17] The critical portions of the ITO are as follows:

> 3. That, on October 10, 2008 at 3:35 p.m. Gord Peterson contacted the Whitehorse RCMP and reported that an employee of his, Doug Alan Hamilton, failed to show up to work for work today, as scheduled. Hamilton and Peterson both work at Northwest Tel (sic) and Peterson states such behavior is unusual for Hamilton particularly as he drives a company vehicle to and from work. Peterson attended Hamilton's residence located at 3 Solitude Drive in Marsh Lake south of Whitehorse, Yukon Territory at 3:00 p.m. and made the following observations:
>
> a) Hamilton's work vehicle, a Northwest Tel 'Bucket Truck' was parked in the residence.
>
> b) Hamilton's other vehicle, a blue hatchback was not present.
>
> c) There was a window open on the top floor which struck Peterson as unusual given the present weather conditions.
>
> d) There was no answer at the door.
>
> …
>
> 5. That, on October 10, 2008, at 3:45 p.m. Constable Greer on the Whitehorse RCMP was assigned the file. Constable Greer queried Hamilton on PROS and obtained the following information:
>
> a) There was only one entry regarding Hamilton on PROS, this was regarding a motor vehicle accident that occurred January 7th, 2007. There was no next of kin information on file.
>
> b) At that time, Hamilton provided his address at 3 Solitude Drive, Marsh Lake, Yukon Territory.
>
> 6. That, on October 10, 2008 at approximately 16:05 hours Constable Greer conducted inquiries with the Whitehorse General Hospital and obtained the following information:

a) Hamilton had not been a patient at the Whitehorse General Hospital in the last ten years and they had no next of kin information on file.

7. That, on October 10, 2008 at 17:43 hours Constable Greer attended 3 Solitude Drive, Marsh Lake, Yukon Territory with a locksmith. Constable Greer knocked on the front door and received no response. Constable Greer during this time made the following observations:

a) That a Northwest Tel 'Bucket Truck' was located on the property as well as a vehicle bearing Yukon Licence Plate ERF 69.

b) There was a window open on the top floor.

c) In addition to the principal residence, Constable Greer noted several outbuildings, vehicles, and campers on the property.

…

9. That, on October 10, 2008 at approximately 17:45 hours Constable Greer queried Yukon marker ERF 69 on CPIC and obtained the following information:

a) ERF 69 is associated to a 2004 Chrysler Concorde, Maroon in colour, registered to a Lorraine Foubister of 3 Solitude Drive, Marsh Lake, Yukon Territory.

10. That, on October 10, 2008 at 17:50 hours Constable Greer entered the main residence through the front door after the locksmith opened the door located at 3 Solitude Drive, Marsh Lake, Yukon Territory. Constable Greer noted the following:

a) The interior of the residence was in a state of disarray.

b) No odour conducive (sic) with a deceased person was noted.

c) No odour indicative of marihuana was noted at that time.

[18] After entering the Residence and walking through it, marijuana and equipment for cultivating it were observed, as were unsecured firearms. Cst. Greer

also looked briefly into a green garbage bag and observed marijuana leaves. The ITO continues as follows:

> 21. Constable Greer than exited the house and proceeded to investigate the cabin like structure at the rear of the property. Constable Greer determined there was a possibility the structure could be a type of residence as it had a heating tank, sewer pipes, and electrical cables connected to the building. The door to the structure was on the front and was secured using a deadbolt. Constable Greer determined that it was necessary to remove the lock to facilitate access to the structure in order to eliminate the possibility that Doug Alan Hamilton was within that structure.
>
> 22. Constable Greer had the locksmith drill the lock which allowed the door to be opened. Upon loosening of the door, Constable Greer immediately noticed a strong odour of raw marihuana emanating from the structure.
>
> 25. Constable Greer did not locate Doug Alan Hamilton anywhere on the property. At the time of this application, Police had not determined his whereabouts and well being.

Evidence of Gord Peterson

[19] Mr. Peterson was Mr. Hamilton's supervisor and knows him through ten years of working together. He testified that he went to Mr. Hamilton's residence in the afternoon of October 10, 2008 to make sure that the work truck was safe and to make sure Mr. Hamilton was not "playing hookey".

[20] When no one responded to his knocks on the door, Mr. Peterson returned to work. He contacted the RCMP 15 – 30 minutes later.

[21] Mr. Peterson testified that he believes the first person he spoke to was a police officer. He expressed concern to this individual that Mr. Hamilton had been in an accident. He testified that, if that were the case, he expected that the RCMP would know. He further testified that he told this individual that he didn't want to get

"too excited about it", as Mr. Hamilton was probably out hunting and forgot to call in. He said that he told this individual that it was not like Mr. Hamilton to not show up for work without calling in.

[22] Mr. Peterson recalled speaking to Cst. Greer when Cst. Greer was at the Residence. Cst. Greer asked him whether he thought Mr. Hamilton was suicidal and Mr. Peterson told him that to his knowledge he wasn't.

[23] Mr. Peterson testified that he became concerned about how much attention the RCMP were paying to the matter after he received perhaps two more phone calls that day. As a result, he called some of Mr. Hamilton's friends and learned that Mr. Hamilton had gone hunting. Mr. Peterson spoke to an RCMP officer, likely Cpl. Pelletier, and relayed this information to him.

Evidence of Carolynne Fujita

[24] Ms. Fujita is a neighbour of Mr. Hamilton and lives on the same cul-de-sac. On October 10, 2008 she came home from her work as a veterinarian in Whitehorse. She estimated that she arrived home at 5:00 or perhaps afterwards, although it was not clear how much afterwards it could have been. As she drove by the Residence she observed a police vehicle parked approximately five metres back into Mr. Hamilton's driveway. She could not recall ever having seen a police vehicle on that cul-de-sac either before or after October 10, 2008.

[25] Ms. Fujita was unable to recall whether the police vehicle was marked or unmarked and whether it was facing in towards the residence or out towards the cul-de-sac.

[26] She noted that there were individuals inside the police vehicle but she was unable to tell whether they were male or female or whether they were in uniform or not.

[27] She testified that she continued on into her residence. At approximately 7:30 or 8:00 she observed flashlights moving around on the back of Mr. Hamilton's property. Shortly afterwards, two uniformed police officers came to her door and asked whether she knew where Mr. Hamilton was. She told them that she assumed he was probably on a hunting trip.

[28] Ms. Fujita did not provide any evidence as to whether the occupants of the police vehicle had observed her or not.

[29] Ms. Fujita e-mailed her boyfriend later that evening and told him what she had observed. She reviewed this e-mail prior to testifying.

Evidence of Cst. Greer

[30] Cst. Greer testified that he received the initial call regarding Mr. Hamilton's whereabouts at approximately 3:35 p.m. while he was on patrol.

[31] The dispatch operator advised Cst. Greer that Mr. Peterson had called in to express concern about Mr. Hamilton not being at work. Cst. Greer then phoned Mr. Peterson and they had a brief, approximately five minute, conversation. Mr. Peterson told him that Mr. Hamilton had not shown up for work and not called in, which he felt was unusual. Mr. Peterson had gone to Mr. Hamilton's residence and observed an open window which he thought was "strange". This conversation was not recorded in Cst. Greer's notes.

[32] Cst. Greer then made enquiries on the RCMP Police Record and Occurrence System for next of kin or friends to see if they could assist in determining Mr. Hamilton's whereabouts. The only information he received was regarding one motor vehicle occurrence and it contained only Mr. Hamilton's phone number and address.

[33] Cst. Greer then contacted the Whitehorse General Hospital to make enquiries as to whether they had a record of any next of kin for Mr. Hamilton, but he was

advised they had no such information. Cst. Greer testified that he did not enquire as to whether Mr. Hamilton was a patient at the hospital as they are reluctant to give out such information. His experience in the past has been that the hospital staff will, however, provide next of kin information.

[34] Cst. Greer then contacted the Motor Vehicles Branch to see which vehicles were registered to Mr. Hamilton.

[35] Cst. Greer made several unsuccessful attempts to contact Mr. Hamilton on his home and cell phone numbers.

[36] Cst. Greer then contacted his immediate supervisor, Cpl. MacDougall, and advised him of the information he had. As a result of this discussion, a decision was made that Cst. Greer would go to the Residence to investigate further. Cst. Greer was told to take a locksmith with him.

[37] Cst. Greer contacted a locksmith and they drove to the Residence in separate vehicles, arriving at roughly the same time, with the locksmith being there first. Cst. Greer testified that he drove to the Residence at normal speed without activating the police cruiser emergency equipment. He arrived at approximately 5:43 p.m. after about a 45 minute drive.

[38] Once at the Residence, Cst. Greer conducted a quick visual inspection of the main residence, outbuildings and vehicles. He knocked on the door and called out Mr. Hamilton's name.

[39] Cst. Greer contacted Mr. Peterson by telephone approximately 2-3 minutes after arriving. Mr. Peterson told Cst. Greer that he still didn't know where Mr. Hamilton was. They discussed the open window being unusual and Mr. Peterson responded to Cst. Greer's question about the possibility of Mr. Hamilton being suicidal by stating that he was not aware of any concerns in that regard; certainly Mr.

Hamilton had not mentioned it. Cst. Greer admitted in cross-examination that he may have asked Mr. Peterson whether he had noticed the open window and was it unusual, to which Mr. Peterson may have responded "yes".

[40] Mr. Peterson also told Cst. Greer that Mr. Hamilton's personal blue vehicle was not at the Residence when he had been over earlier in the afternoon. Cst. Greer testified that he thought perhaps someone had borrowed this vehicle. He testified that, although logical, his first thought was not that perhaps Mr. Hamilton had taken his own vehicle, and he agreed that he had no basis to assume anyone else had borrowed it.

[41] Cst. Greer testified that the open window appeared to be off its hinges and the curtain behind it was swaying and appeared to be ripped.

[42] Cst. Greer again contacted Cpl. MacDougall, updated him as to the status of the investigation and advised him of his concern for Mr. Hamilton's safety. Cpl. MacDougall told him to enter the Residence and make sure that Mr. Hamilton was not in need of assistance.

[43] With the assistance of the locksmith, Cst. Greer entered into the Residence and upon Mr. Hamilton not being located inside, contacted Cpl. MacDougall by phone again. He advised Cpl. MacDougall that he was going to enter into the Outbuilding to continue searching for Mr. Hamilton, and did so, again with the assistance of the locksmith. Cst. Greer then returned to the residence, spent about 20 more minutes inside and then contacted Cpl. MacDougall a third time, at which point he was told to secure the Residence. It was about then that the locksmith left the scene. Cst. Greer estimated the time to be approximately 6:30. p.m.

[44] Cst. Greer testified that did not believe he had spoken to a neighbour of Mr. Hamilton's while at the Residence. He stated that, although it crossed his mind, he decided not to attempt to speak to any neighbours before entering Mr. Hamilton's

residence due to his concerns for Mr. Hamilton's safety. Cst. Greer stated that his concern was based upon Mr. Hamilton's abnormal behaviour in being absent from work without calling in, and his view of the open window and blinds on the second floor.

[45] Cst. Greer testified that he may have sat in his unmarked white Impala police vehicle with the locksmith. He further testified that this likely would have been while he was contacting telecoms shortly after arriving at the Residence.

[46] Cst. Greer agreed in cross-examination that, although he had no specific recollection of it, Mr. Petersen may have told him that he wondered whether Mr. Hamilton had been in an accident, and that Mr. Hamilton was probably out hunting. Cst. Greer testified, however, that if he had thought that Mr. Hamilton was possibly out hunting he might have acted differently.

[47] There is no mention in the notes or Occurrence Report prepared by Cst. Greer that Mr. Peterson had informed him Mr. Hamilton was probably out hunting, and Mr. Peterson cannot say for sure that it was Cst. Greer he said this to. As such, while it is possible, it cannot be said with certainty that Cst. Greer was aware of this information when he made the warrantless entry into the Residence.

[48] At 7:14 p.m. Cst. Gagnon arrived on the scene. Cpl. Pelletier arrived sometime after 9:00 p.m. Cpl. Pelletier advised Cst. Greer that he had received information from Mr. Peterson that Mr. Hamilton was indeed hunting.

[49] Cst. Greer spoke to Cst. Terleski over the phone on perhaps three occasions for five to ten minutes each time and relayed the information Cst. Terleski required to prepare the ITO for a search warrant. Cst. Greer's final conversation with Cst. Terleski occurred after he had spoken to Cpl. Pelletier. Cst. Greer stated that he did not tell Cst. Terleski about Mr. Hamilton being located because he believed this information had already been relayed to him by others, and in all likelihood by Cpl.

MacDougall. Cst. Greer stated that he did not review the entire ITO prior to it being presented to the authorizing judge.

Cst. Terleski

[50] Cst. Terleski prepared the ITO and appeared before the issuing judge to apply for the search warrant. In doing so, he relied on the information provided to him by Cst. Greer. He testified that he had only one conversation with Cst. Greer, and it lasted 45 minutes or more. He testified that the ITO contained all the information relayed to him by Cst. Greer. He stated that Cst. Greer did not mention to him any comments made by Mr. Peterson suggesting that Mr. Hamilton was probably out hunting or that, to his knowledge, Mr. Hamilton was not suicidal. Cst. Terleski stated that he would have included this in the ITO had he been aware of it.

[51] Cst. Terleski worked under the supervision of Cpl. MacDougall, from whom he received advice in the drafting of the ITO. This was Cst. Terleski's first time drafting an ITO.

[52] Cst. Terleski testified that he completed the ITO and draft warrant by approximately 10:00 p.m. The warrant was issued at 11:10 p.m. Cst. Terleski contacted the issuing judge again at 11:25 p.m. by telephone in order to include in the warrant the hours the warrant was to be effective, the omission of which had been an oversight.

[53] Cst. Terleski testified that he confirmed the accuracy of the information in the ITO by conducting a verbal read back to Cst. Greer over the telephone.

[54] Cst. Terleski testified that he was not told prior to attending before the authorizing judge that the RCMP had received information that Mr. Hamilton was out hunting.

[55] Cst. Terleski testified that the only question he was asked by the authorizing judge was whether Mr. Hamilton had been located. There was no evidence about whether he was asked this question before or after the warrant had been issued.

Other Evidence

[56] In lieu of requiring Cpl. Pelletier, Cpl. MacDougall and Sgt. Wyers to testify, and with the agreement of defense counsel, Crown counsel filed a General Occurrence Report prepared by Cpl. Pelletier, a Supervisor's Check Sheet "Information to Obtain Search Warrant/Search Warrant" prepared by Cpl. MacDougall, and a Crown Memo to File. The following information was obtained from these documents.

[57] Cpl. Pelletier contacted Mr. Peterson at 8:18 p.m. and was told that Mr. Hamilton was probably out hunting. Mr. Peterson then telephoned Cpl. Pelletier at 9:00 p.m. to tell him that he had confirmed with another employee that Mr. Hamilton was hunting in the Kang [sic] Tung Mine area. Cpl. Pelletier relayed this information to Cpl. MacDougall and Sgt. Wyers by 9:30 p.m.

[58] Cpl. MacDougall does not recall Cpl. Pelletier advising him that Mr. Hamilton's whereabouts had been determined, other than a conversation from the scene after the search warrant had been obtained. However, he acknowledges that Cpl. Pelletier may have done so. That said, Cpl. MacDougall stated that, had he received this information from Cpl. Pelletier, he would have asked for it to be included in the ITO as it would not have changed the basis for the application for the warrant.

[59] Sgt. Wyers confirmed that he was contacted at home by Cpl. Pelletier who provided him with the additional information as to Mr. Hamilton's whereabouts. Sgt. Wyers was not further involved with anyone in the investigation prior to the search warrant being executed.

[60] The Supervisor's Check Sheet was completed on October 10, 2008, although the specific time it was completed is not noted. Cpl. MacDougall checked the following boxes:

> □ PROVIDED FULL DISCLOSURE INCLUDING ANY INFORMATION WHICH MIGHT POSSIBLY CAUSE THE JUSTICE TO DECLINE TO ISSUE THE WARRANT.
>
> THIS SEARCH CONSTITUES A HIGH RISK SEARCH … □ NO

Law and Analysis

[61] The criteria for the issuance of a search warrant pursuant to s. 11 of the *CDSA* is as follows:

> (1) A justice who, on ex parte application, is satisfied by information on oath that there are reasonable grounds to believe that
>
> (a) a controlled substance or precursor in respect of which this Act has been contravened,
>
> (b) anything in which a controlled substance or precursor referred to in paragraph (a) is contained or concealed,
>
> (c) offence related property, or
>
> (d) anything which will afford evidence in respect of an offence under this Act or an offence, in whole or in part in relation to a contravention of this Act, under section 354 or 426.31 of the *Criminal Code*
>
> is in a place may, at any time, issue a warrant authorizing a peace officer, at any time, to search the place for any such controlled substance, precursor, property or thing and to seize it.

[62] A reviewing judge only enquires into whether there was any basis upon which the authorizing judge could be satisfied that the relevant statutory preconditions for the issuance of a warrant existed.

[63] 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" (***R.*** v. ***Garofoli,*** [1990] 2 S.C.R. 1421 at para. 56).

[64] The authorizing judge's decision to issue a search warrant was based on Cst. Greer's observation of marijuana and equipment for the cultivation of marijuana. These observations were made when Cst. Greer was in the Residence and the Outbuilding during his warrantless entries. Cst. Greer's believed that exigent circumstances existed to justify the entries under common law. In issuing the warrant on the basis of Cst. Greer's observations, the authorizing judge did not consider and weigh the facts that Cst. Greer relied on to justify his entries.

[65] As stated in Hutchison, *Canadian Search Warrant Manual 2003 – A Guide to Practical and Legal Issues* (Toronto: Thomson-Carswell, 2003) at pp. 32-33:

> Clearly, a judicial officer considering a warrant application cannot simply ignore an obvious and well-established breach, such as a warrantless perimeter search. It should be emphasized, however, that the justice's role is not to tease out every possible constitutional breach that may or may not be sustainable, the constitutional law governing police conduct is subtle and complex, often turning on delicate questions of reasonableness and context…It is important to always have in mind that the warrant application process is not the place where constitutional complaints are litigated in any normal sense. It is only where the possible breach "leaps out" from the face of the Information to Obtain that the issuing judicial officer should consider raising these issues.

[66] As set out in the ITO, there was some basis for Cst. Greer's determination that he had a common law right of entry into the Residence and Outbuilding. As such, nothing "leaped out" with respect to the searches being a clear breach of Mr. Hamilton's constitutional rights and, as the observations of Cst. Greer in relation to the presence of controlled substances and cultivation equipment meet the criteria set out in s. 11 of the *CDSA*, the warrant was properly issued.

[67] To the extent that the authorizing judge considered the evidence with respect to the existence of exigent circumstances, it was to ensure that there was no clear and readily apparent breach of Mr. Hamilton's *Charter* rights; this consideration did not require him to reach the conclusion that there was not a *Charter* breach.

[68] Therefore, in considering the *Charter* application before me, I am able to consider the contents of the ITO, as well as the evidence adduced in the *voir dire*, and reach my own conclusion as to whether the warrantless entries by Cst. Greer were justified at common law.

[69] I accept that the following information was omitted from the Information to Obtain:

(i) that Mr. Peterson told the RCMP, and possibly Cst. Greer, that Mr. Hamilton was probably out hunting;

(ii) that Mr. Peterson told the RCMP that he did not want to get too excited about it as Mr. Hamilton likely forgot to call in, although it is not clear whether Cst. Greer was aware of this comment;

(iii) that Mr. Peterson was asked by Cst. Greer whether Mr. Hamilton was suicidal and that he replied that to his knowledge he was not.

[70] It is also clear that a portion of paragraph 25 of the Information is incorrect. To the extent that this paragraph indicates that the RCMP still had not determined Mr. Hamilton's "whereabouts and well-being", the RCMP knew, prior to Cst. Terleski attending before the authorizing judge that Mr. Hamilton was away on a hunting trip. This information should have been, but was not, communicated to Cst. Terleski and to the authorizing judge.

[71] Defense counsel says that the omissions and incorrect information would have been relevant to the authorizing judge's decision to issue the warrant. Crown counsel submits that they are irrelevant. I must consider whether, on amplification, the warrant could have been issued. This requires me to evaluate the *Charter* compliance of Cst. Greer's warrantless entries in light of all the facts as they were detailed in the *voir dire*.

[72] Firstly, with respect to the subsequent determination of Mr. Hamilton's whereabouts, I consider this to be irrelevant to the issue of whether exigent circumstances existed such as to authorize the searches conducted by Cst. Greer. An examination of the circumstances known to Cst. Greer at the time he made the decision to enter the Residence and subsequently the Outbuilding, is all that is required. The fact that Mr. Hamilton's whereabouts were later determined does not impact upon the consideration of whether exigent circumstances existed at the time of entry. At best, it is a verification of the suggestion by Mr. Peterson that Mr. Hamilton was probably out hunting, but this verification, coming when it did, does not assist.

[73] I consider the three pieces of additional information set out above relevant in considering whether exigent circumstances existed. I acknowledge Crown counsel's submission that some of it is speculative, with the exception of Mr. Peterson stating that he did not want to get too excited about Mr. Hamilton's non-attendance at work.

[74] This information was known by Cst. Greer, or, to the extent it was known internally within the RCMP, it should have been known by him. It must be considered with the other information available to Cst. Greer at the time he concluded exigent circumstances existed.

[75] In sum Cst. Greer was, or should have been, aware of the following information when he left Whitehorse to drive to the Residence:

(1) Mr. Hamilton had not shown up for work and had not contacted his supervisor, Mr. Peterson. This was unusual enough for Mr. Peterson to contact the RCMP;

(2) Mr. Peterson had initially enquired as to whether the RCMP had any information about Mr. Hamilton being in an accident;

(3) Mr. Peterson stated that he did not want to get too excited about it as Mr. Hamilton was probably out hunting;

(4) Mr. Peterson had gone to Mr. Hamilton's residence and noted the following:

    (i) The NorthwesTel work truck driven by Mr. Hamilton was on the property;

    (ii) Mr. Hamilton's personal vehicle was not on the property;

    (iii) An upstairs window was open which was unusual given the weather;

    (iv) He knocked on the door and there was no answer;

(5) There was no indication that Mr. Hamilton had been in a motor vehicle accident;

(6) There was no indication that Mr. Hamilton was a patient at the Whitehorse General Hospital;

(7) There was no information from the Motor Vehicles Branch that Mr. Hamilton had any next of kin;

(8) There was no information from the Whitehorse General Hospital that Mr. Hamilton had any next of kin;

(9) Mr. Hamilton was not answering calls made to his home or cell phone number.

[76] Once at the Residence, but prior to entry, Cst. Greer had the following additional information:

(1) The open upstairs window appeared to be have been forced open from the inside as it appeared to be off its hinges;

(2) There appeared to be a torn blind in the window;
(3) A vehicle registered to Lorraine Foubister, address 3 Solitude Dr. was on the property;
(4) There were several outbuildings, vehicles and campers on the property;
(5) Mr. Peterson told him that, to his knowledge, Mr. Hamilton was not suicidal.

[77] The only additional information that Cst. Greer possessed after entering the Residence and prior to entry into the Outbuilding were his observations that:

(1) The interior of the residence was in a state of disarray;
(2) There was no-one inside the residence.

[78] With respect to the entry into the Outbuilding, notwithstanding some concerns I have about the reasonableness of the Cst. Greer's belief that this was a type of cabin or residence which could be housing Mr. Hamilton, I consider that, if exigent circumstances existed to authorize the entry into the Residence, there was then a sufficient basis to obtain a warrant to search both the Residence and the Outbuilding, based upon the marijuana and cultivation paraphernalia that Cst. Greer saw inside the Residence. If exigent circumstances to enter the Residence did not exist, then they did not exist to subsequently authorize entry into the Outbuilding either. Therefore, to a large extent, the warrantless entry into the Outbuilding is not of particular assistance in resolving this matter.

[79] I do not consider the warrantless entry into the Outbuilding evidence that would lead me to conclude that the prior entry into the Residence by Cst. Greer was made for reasons other than his subjective belief that he needed to do so to try to locate Mr. Hamilton. There is no evidence before me that would lead me to believe that the RCMP, and/or Cst. Greer in particular, had any reason to suspect Mr.

Hamilton of any involvement in the cultivation of marijuana, or any other criminal activity that they wished to gain entry into his residence to investigate.

[80] I have examined the photographs of the Residence taken from the outside. While the exterior of the Residence is somewhat rustic and rough, the open window and torn blind together appear to be somewhat unusual, as noted by Cst. Greer. However, I cannot say that it is in complete contrast to the remainder of the exterior of the Residence.

[81] The initial investigative actions of Cst. Greer are consistent with him approaching the situation in a reasonable manner, and not with any particular urgency. He made relatively routine inquiries and drove to Mr. Hamilton's residence at a normal rate of speed without activating any emergency equipment.

[82] Besides the information from Mr. Peterson that to his knowledge Mr. Hamilton was not suicidal, the only significant additional information Cst. Greer had once he was at the Residence, was his own observation that the open window looked as though it was off its hinges and that there appeared to be a torn blind behind it.

[83] The accepted test for evaluating the common law duties and powers of the police is as follows:

1. Does the conduct fall within the general scope of any duty imposed by statute or recognized at common law; and
2. Does the conduct, albeit within the general scope of such a duty, involve an unjustifiable use of powers associated with the duty. (***R.*** v. ***Godoy***, [1999] 1 S.C.R. 311 at para. 12)

[84] Police officers have a common law duty which includes the "…preservation of the peace, the prevention of crime and *the protection of life* and property". (***Godoy*** at para. 15, emphasis in original). This duty is engaged whenever it can be inferred

from the circumstances that an individual is or may be in some distress. The police must "…reasonably believe that the occupant is in distress and entry is necessary…to protect life, prevent death and serious injury" (***Godoy*** at para. 25 referring to the judgment of Finlayson J. in the Court of Appeal decision in the same case).

[85] In ***Godoy***, the Court was dealing with a disconnected 911 call. The Court held in para. 18 that "…it was necessary for the police to enter the appellant's apartment in order to determine the nature of the distress call. There was no other reasonable alternative to ensure that the disconnected caller received the necessary assistance in a timely manner". In finding the police entry lawful in that case, the Court balanced the privacy interests of an individual in his or her residence against the core values of dignity, integrity and autonomy of a person who has sought the assistance of the police through a 911 call.

[86] In my view, the observations regarding the window and the blind are insufficient, when considering all the other information in the possession of Cst. Greer and the RCMP, to create a situation where the common law duty of Cst. Greer to protect life was engaged to authorize him to enter into the Residence and the Outbuilding.

[87] There was no reasonable basis for Cst. Greer to believe that Mr. Hamilton was in danger or had been harmed in any way, or that he was otherwise in medical distress. While such a possibility existed, it was a tenuous possibility at best. Given that Mr. Hamilton's personal vehicle was not present, it would be reasonable, in light of all the available information, to conclude that Mr. Hamilton had gone hunting in it and had simply neglected to advise his employer. While it was possible that someone had harmed Mr. Hamilton and driven away in his vehicle, this conclusion, in my view, is much more speculative. There was also no evidence that Mr. Hamilton suffered from a life threatening medical condition.

[88] I find that Cst. Greer decided, out of an abundance of caution, to enter the Residence just to make sure that Mr. Hamilton was not inside. While in and of itself this decision was not in pursuit of any improper purpose, it was nonetheless unlawful. I do not accede to defense counsel's argument that, by requesting the services of a locksmith in advance of going to the Residence, Cst. Greer was intending to enter the Residence in any event. I accept Cst. Greer's testimony that, in the event he decided to enter the Residence, the services of a locksmith would minimize or prevent any unnecessary damage. I consider this to be a reasonable precaution.

[89] However, I agree with the submission of Mr. Coffin that Cst. Greer should not have chosen to enter the Residence and Outbuilding, but rather should have continued his investigation by less intrusive means. There is no evidence that he made any efforts to contact Ms. Foubister, for example, notwithstanding that he had learned she also was a resident of 3 Solitude Dr.

[90] The circumstances in this case are not the same as one where there is a distress call emanating from a dwelling place which provides the police with a location and time of an individual in possible distress. Clearly the common law power of the police is engaged in such an instance where there is a known indicator of distress. In the present case, there was no indicator of possible distress, but rather an unknown reason why Mr. Hamilton was not at work. I find in all the circumstances, known and unknown, that it was not necessary for Cst. Greer to enter the Residence and the Outbuilding, or that no other reasonable options were available.

[91] Further, while I accept that there is no evidence that Cst. Greer saw or heard Ms. Fujita drive by, I would expect that it would have been reasonable to have at least checked with the neighbours to see if any were home and, if so, might have been able to provide information regarding the whereabouts of Mr. Hamilton. In saying this, I do not intend to impose a duty on Cst. Greer to have done so.

However, the extent to which reasonable options short of entry into the Residence were available and pursued, is a factor when considering whether it was necessary for Cst. Greer to enter the Residence

[92] With respect to Ms. Fujita's evidence, it is not entirely clear whether she drove by prior to or after the entry. It seems that her observations are consistent with her having arrived prior to the entry, however, as the only other individual present with Cst. Greer before 7:00 p.m. was the locksmith, and Cst. Greer testified that the locksmith may have sat in his vehicle before the entry. As the locksmith arrived first, it is also logical that his vehicle could have been further up the driveway towards the residence and not immediately visible to Ms. Fujita.

[93] I do not consider the evidence of Ms. Fujita to be particularly damning to the Crown's argument in and of itself, however, it points towards the possibility that Cst. Greer may have received additional useful information about Mr. Hamilton's whereabouts that could have changed his view of the need to make a warrantless entry into the Residence and Outbuilding, had he taken the time to check with the neighbouring residences that were close by.

[94] I acknowledge that this is a speculative observation, as it is also possible that Cst. Greer would not have received any useful information from neighbours, or been able to locate Ms. Foubister.

[95] In the end, there was simply an absence of evidence that Mr. Hamilton may have been lying injured, ill or dead in his Residence or the Outbuilding. There was another more reasonable and likely explanation, supported by the available information, for his unexplained absence from work.

[96] As such, I find that there was no common law right of entry into the Residence and Outbuilding. As the entries were unlawful, all the observations of Cst. Greer made within the Residence and Outbuilding should be excised from the

ITO. Without paragraphs 10 – 24 of the ITO there is an insufficient basis in the ITO to justify the issuance of the search warrant. Therefore I find that the searches of the Residence and Outbuilding pursuant to the issuance of the search warrant were a violation of Mr. Hamilton's s. 8 *Charter* right to be free from unreasonable search and seizure.

Section 24(2) Exclusion of Evidence

[97] The test under s. 24(2) of the *Charter* has been modified by the Supreme Court of Canada in the ***R.*** v. ***Grant*** 2009 SCC 32 and ***R.*** v. ***Harrison*** 2009 SCC 34 decisions. Trial judges are now required to view all the relevant circumstances in the s. 24(2) analysis, and considerably less significance is accorded to the distinction between conscriptive and non-conscriptive evidence. The current test is more flexible.

[98] There are three lines of inquiry for the trial judge in the s. 24(2) analysis. In para. 71 of ***Grant*** the Court stated the following:

> 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 *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual's rights count for little), and (3) society's interest in adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s. 24(2) determination as enunciated in *Collins* and subsequent jurisprudence.

The seriousness of the Charter-infringing state conduct

[99] The more serious the state conduct that infringed the *Charter* rights of the accused, the more this aspect of the test will favour exclusion of the evidence obtained as a result of the breach.

[100] I consider the actions of Cst. Greer in entering the Residence to be motivated by his desire to locate Mr. Hamilton and to confirm or eliminate the possibility that he may have come to harm. I do not consider his decision to enter the Residence to have been an act of bad faith on his part or otherwise improperly motivated.

[101] Once inside the Residence, looking into the garbage bag where marijuana was located cannot be said to be consistent, in the circumstances, with a sole purpose search for Mr. Hamilton, however, this act appears to be more spontaneous in nature than indicative of a deliberate shift in Cst. Greer's reason for being in the Residence.

[102] The search of the Outbuilding is somewhat more questionable. While it is not outside of the realm of possibility that the Outbuilding was some form of residence, there is little in the way of appearance to support this. From the photographs, the Outbuilding appears small in size, windowless (except the window in the door), and has an unfinished wood chip board exterior. It was, however, serviced with heat, electricity and sewer connections.

[103] Cst. Greer's testified that he believed the Outbuilding needed to be searched to eliminate the possibility that Mr. Hamilton could be in there. While there may be some merit to this testimony, it certainly would be a more compelling argument had there been any evidence that Cst. Greer had also searched the other outbuildings, vehicles and campers on the property for Mr. Hamilton. It seems that the active search for Mr. Hamilton terminated after the entry into the Outbuilding, and the decision to seek a search warrant was made, even though there appeared to be other locations on the property where Mr. Hamilton, or related probative evidence, could be located, had he been a victim of foul play or suicide,.

[104] I keep in mind the testimony of Ms. Fujita that she saw lights moving around in the back of Mr. Hamilton's property for several hours after approximately 8:00

p.m. There was no evidence, however, as to what the individuals, presumably police officers, with the lights were doing or if they were searching for anyone or anything.

[105] All in all, I find Cst. Greer's actions in the initial warrantless search to be closer to a good faith search in the continuum between good faith and bad faith.

[106] There remain, however, the actions of the RCMP in the preparation of the ITO for presentation to the issuing judge. I find that the ITO was deficient in that it did not include the whole of the relevant information provided from Mr. Peterson to the RCMP.

[107] Crown counsel submits that this additional information provided by Mr. Peterson is irrelevant as it is opinion and speculative and, as such, should not have been included in the ITO. I disagree. The framework for the initial warrantless entry was set out in the ITO in support of Cst. Greer's belief that he had a duty to enter the Residence and Outbuilding to determine whether Mr. Hamilton was injured, ill or deceased. In order to authorize a search warrant, the ITO had to demonstrate to the issuing judge at least some basis for the warrantless entry. In the context of providing full and frank disclosure in the *ex parte* application for a warrant, the ITO should have included any information which Cst. Greer had, or should have had, in deciding whether circumstances existed to justify the warrantless search at common law.

[108] While the issuing judge was not required to make a determination at the time as to whether Cst. Greer in fact possessed the subjective belief that exigent circumstances existed, or as to whether his belief was objectively sustainable, it is nonetheless important to ensure that an ITO in support of the issuance of a search warrant on an *ex parte* application contain a full and balanced portrayal of the situation. In the present case, all the information tending to support the existence of

exigent circumstances was included in the ITO and certain information tending to militate against the existence of exigent circumstances was omitted.

[109] As stated in ***R.*** v. ***Morelli***, 2010 SCC 8 at in a discussion of the first branch of the s. 24(2) analysis in ***Grant***:

> …Police officers seeking search warrants are bound to act with diligence and integrity, taking care to discharge the special duties of candour and full disclosure that attach in *ex parte* proceedings. In discharging these duties responsibly, they must guard against making statements that are likely to mislead the justice of the peace. They must refrain from omitting or concealing relevant facts. And they must take care not to otherwise exaggerate the information upon which they rely to establish reasonable and probable grounds for issuance of a search warrant. (para. 102)

[110] In saying this, I want to make it clear that the affiant, Cst. Terleski, was unaware of any of this information as it was not communicated to him. As such, I do not consider his actions at all blameworthy.

[111] Further, a portion of paragraph 25 of the ITO is clearly incorrect. It was known to the RCMP, and to Cst. Terleski's immediate superior, Cpl. MacDougall, that Mr. Hamilton's whereabouts had been ascertained prior to the completion of the ITO and prior to the application for a warrant. What exacerbates the nature of this incorrect information is that it relates to, and in fact is, the very reason for the initial warrantless entry, and the only question asked by the authorizing judge is whether Mr. Hamilton's whereabouts had been determined. Cst. Terleski, who had not been told that Mr. Hamilton whereabouts had been determined, was unable to provide the authorizing judge with the correct answer.

[112] What further exacerbates this incorrect statement is that Cst. Terleski's supervising officer in the drafting of the ITO, Cpl. MacDougall, had been informed that Mr. Hamilton's whereabouts had been determined, but he reviewed the ITO and completed the Supervisor's Check Sheet, without correcting this error. He allowed

Cst. Terleski to swear to the truth of information that he, Cpl. MacDougall, knew, or should have known, was untrue.

[113] While I am not prepared to find that Cpl. MacDougall's actions were deliberate, they were at least careless.

[114] In reality, the inclusion of this paragraph in the ITO was unnecessary in any event. Whether Mr. Hamilton had been subsequently located does not bear on whether the circumstances that existed at the time Cst. Greer made the initial warrantless entry into the Residence and Outbuilding justified his entry at common law. At best, the subsequent determination that Mr. Hamilton was out hunting simply reinforces the reasonableness of the possible explanation for Mr. Hamilton's absence proffered by Mr. Peterson. The situation is somewhat analogous to a police officer conducting a warrantless search of a motor vehicle on a suspicion that contraband may be found there; the fact that contraband is located, thus proving the police officer to have been correct in his suspicion, does not serve to retrospectively elevate the original suspicion to reasonable grounds to believe. The fact that Mr. Hamilton was subsequently determined to be out hunting, does not alter the weight that Cst. Greer should or would have given to this information in his consideration of the circumstances as they existed at the time he concluded he needed to enter the Residence and Outbuilding.

[115] Had paragraph 25 stated that Mr. Hamilton had subsequently been located out hunting, I doubt that this would have had any effect on whether the warrant was issued or not. As to the fact that the authorizing judge asked this specific question of Cst. Terleski, I find that he could still have issued the warrant had paragraph 25 been correct in stating Mr. Hamilton's whereabouts had been ascertained. While I do not know whether this question was asked before or after the warrant was issued, in these circumstances I do not consider it to ultimately make any difference. I reiterate that the basis for the issuance of the search warrant was fulfillment of the criteria set out in s. 11 of the *CDSA*, not a determination by the authorizing judge

that the circumstances were sufficient to authorize Cst. Greer to enter the Residence and Outbuilding at common law.

[116] As stated by Ruddy C.J. in ***R.*** v. ***Wing and Richard*** 2009 YKTC 113 at para. 53:

> It must be remembered that the prior judicial authorization process is an *ex parte* one, which does not allow for the accused to challenge the validity of information being presented to the issuing judge before a search warrant is granted and executed. Given this, it is vital that there be scrupulous adherence to the standards expected in the process as established in both legislation and case law. With respect to a warrant to search a private residence, the standard of reasonable grounds is a clear and well-established one, and must be recognized to be the absolute minimum standard which must be met to support state intrusion into someone's home. To condone intrusions which fall short of this standard runs the risk of eroding the standard itself by sending the message that so long as there is no bad faith and so long as there is some evidence, it does not matter if the minimum standard is met.

[117] In the present case, while the criteria of reasonable grounds to believe that evidence of marijuana cultivation would be found in the Residence and the Outbuilding is satisfied, based upon the observations made in the warrantless search, it nonetheless remains an overriding and important consideration that the ITO be as free from omissions of relevant material and factual inaccuracies as is reasonably possible. While perfection is not required, nor in certain circumstances reasonably possible, care must taken to avoid omissions and errors. In the present circumstances there was no reason, such as urgency, why the ITO should contain omissions and the one factual error in paragraph 25.

[118] In the end, I find that in balancing the actions of Cst. Greer in entering and searching the Residence and the Outbuilding with the omissions and factual inaccuracy of the ITO, a consideration of this first branch of the s. 24(2) analysis militates in favour of exclusion of the evidence. The omissions are certainly not egregious, but I do not consider them to be merely trivial or technical in nature. The factual inaccuracy I consider to be more serious, notwithstanding that it likely did not

contribute to the decision of the authorizing judge to issue the search warrant. The more unilateral the power given to the state to intrude into areas where there are individual expectations of privacy, such being the case with an *ex parte* application for a search warrant for a private dwelling, the greater the responsibility upon the state to exercise care and caution in preparing documents that are accurate, full and frank.

The impact of the breach on the Charter-protected interests of the accused

[119] A search of a dwelling house ranks only behind a search of the person with respect to the intrusive nature of the search. An individual has a high expectation of privacy in his or her dwelling house.

[120] Generally speaking, an unreasonable and unauthorized search of a dwelling place will be considered a serious and significant intrusion into the individual's s. 8 *Charter* protected interests and, as such, will tend to favour exclusion of the evidence.

[121] In the present case, the search of the Outbuilding does not involve a search of a dwelling house. As such, the expectation of privacy is lower than it is with respect to the Residence. That said, I consider the search of the Outbuilding to be directly linked to the search of the Residence and, while I recognize the distinction between the two and the differing degrees of the expectation of privacy each merits, I find that it would be unfair to distinguish between the two in the circumstances of this case.

[122] I conclude that a consideration of this second aspect of the s. 24(2) analysis militates in favour of exclusion of the evidence.

Society's interest in adjudication of the case on its merits

[123] The evidence obtained through the search of the Residence and Outbuilding is highly reliable and would not "…operate unfairly in the truth seeking function of the

trial". (***Harrison*** at para. 34). This evidence is crucial to the Crown's ability to prosecute this case. Without this evidence it is unlikely that any of the individuals charged with these offences can be found guilty of committing them.

[124] I find that a consideration of the third factor of the s. 24(2) test militates in favour of the admission of the evidence into the trial.

Balancing of these factors

[125] The final aspect of the s. 24(2) test is to balance all three of these factors. As stated in ***Harrison*** at para. 36:

> 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 police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed.

[126] The s. 24(2) inquiry must look beyond the particular case before the court in order to consider the "…impact over time of admitting the evidence obtained by infringement of the constitutionally protected rights of the accused": ***Morelli*** at para. 108. In ***Morelli***, the search included not only the private residence but a personal computer inside the residence which, in combination, was considered by the Court to be a highly intrusive search. In excluding the evidence, the Court stated in paras. 110 and 111 that:

> …justice receives a black eye when it turns a blind eye to unconstitutional searches and seizures as a result of unacceptable police conduct or practices.
>
> The public must have confidence that invasions of privacy are justified, in advance, by a genuine showing of probable cause. To admit the evidence in this case and similar cases in the future would undermine that confidence in the long term.

[127] Having considered the circumstances of this case, I find that a balancing of the above three factors requires the exclusion of the evidence that was obtained in the search of the Residence and Outbuilding, as to allow the evidence into trial would have a negative impact on the long-term repute of the administration of justice.

[128] I do not base my conclusion primarily upon the initial entry into the Residence by Cst. Greer. He made a judgment call, without any improper ulterior motive, to enter the Residence to ensure that Mr. Hamilton was not inside. While I have found that he did not have the requisite grounds at common law to do so, I do not consider his actions in this regard to be egregious.

[129] My concerns with respect to the omissions and inaccuracy in the ITO, however, are similar to those of Ruddy C.J.C. in ***Wing***. As she states in para. 64: "…the need to safeguard the integrity of the prior judicial authorization process, particularly in relation to searches of private residences, outweighs the truth-seeking interest of the trial". This does not mean that seeking the truth does not matter in the particular trial under consideration. It simply means that the truth-seeking function of the justice system is, at times, larger than any one particular trial. The hope and expectation is that the long-term integrity of the justice system is enhanced and preserved by excluding the evidence in a particular case and, by excluding the evidence, the court is not only addressing past action but providing direction for further state activity.

[130] Therefore I grant the Defendants' application and exclude any and all evidence obtained as a result of the police search from the trial.

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COZENS T.C.J.