CR 02989

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

HARVEY JOSEPH FIELD

Applicant

REASONS FOR JUDGMENT

1 The accused applies for an order excluding evidence seized as the result of an alleged violation of his right to be secure against unreasonable search or seizure, as guaranteed by s.8 of the *Canadian Charter of Rights and Freedoms*.

2 The accused is charged with the offence of trafficking in a narcotic. At the opening of his trial, a *voir dire* was held to determine the admissibility of the narcotic in question, marihuana, which is the evidence seized, so the accused submits, in violation of his constitutional rights. I heard all of the evidence that the Crown intends to call during the trial on the *voir dire*, so I think it is fair to say that this decision on admissibility may be decisive.

Facts

3 On August 18, 1994, one Adeline Jonasson, a resident of Lutselk'e, was in Yellowknife with her husband. Lutselk'e is a small Dene community close to Yellowknife but accessible only by air or water.

4 At the Yellowknife airport, as Ms. Jonasson and her husband were about to board the scheduled flight back to Lutselk'e, they were approached by the accused who asked them to take two packages for him to people in Lutselk'e. The accused is known to Ms. Jonasson and he has family in Lutselk'e. The two packages were a large box and an envelope. The envelope is padded and of the type commonly used in offices. The envelope was sealed, together with tape, and addressed to a resident of Lutselk'e, one Berna Catholique. Ms. Catholique was also personally known to Ms. Jonasson. Ms. Jonasson took both packages, placing the envelope in her briefcase, and took them on board with her in the airplane.

5 On the airplane during the flight, Ms. Jonasson looked at the envelope. She felt it. She said it felt "soft". She testified that she became suspicious about its contents.

6 The flight from Yellowknife was met at Lutselk'e by Cst. Chauvin of the local R.C.M.P. detachment. This is apparently normal practice. Ms. Jonasson disembarked the airplane, came up to Cst. Chauvin, and gave him the envelope. She told the officer that she felt suspicious about it after feeling it. The envelope was still sealed.

The constable took the envelope back to the detachment office. He too felt the package. He testified that it felt soft. His suspicions were aroused as well.

7 Cst. Chauvin testified that he was aware of the accused. He had a confidential "intelligence" file in which the accused's name was recorded in connection with possible narcotics and alcohol offences. He had also in the past received one or two items of source information relating to the accused, but these were not recorded in the file as he did not think the source was reliable. He had on one occasion participated in a surveillance operation on the accused, but nothing came of it. He knew, however, that the accused had never been charged or convicted of a narcotics offence. Cst. Chauvin testified that he also had confidential intelligence linking the addressee, Berna Catholique, to suspected drug trafficking activities. He acknowledged, however, that to his knowledge no charges had ever been brought against Ms. Catholique.

8 Cst. Chauvin opened the envelope. Inside it, wrapped in plastic, was one ounce of what was subsequently analyzed to be marihuana. The officer candidly acknowledged that he did not even think about getting a warrant. He thought a warrant was unnecessary since the envelope was turned over to him by Ms. Jonasson. He did not consider other investigatory techniques such as the option of delivering the envelope to Ms. Catholique and then setting up surveillance. Cst. Chauvin further acknowledged that there were no exigent circumstances, no sense of urgency, in opening up the envelope. The accused was not charged until March of 1995.

Issues

9 The argument made on behalf of the accused is that he had a privacy interest in the envelope and, therefore, since the search and seizure of the envelope and its contents were done without a warrant and without reasonable and probable grounds, his right to be secure against unreasonable search or seizure within the meaning of s.8 of the *Charter* has been violated. It is submitted that, having regard to all of the circumstances, the evidence should be excluded pursuant to s.24(2) of the *Charter* since its admission into evidence could bring the administration of justice into disrepute.

10 Crown counsel argues primarily that the accused could have had no reasonable expectation of privacy in the envelope once he gave it over to Ms. Jonasson for transport to Lutselk'e. The accused took a risk when he gave up possession and control of the envelope and, while his subjective expectation may have been that it would be delivered to the addressee, on an objective basis, there can be no reasonable expectation that it would not come into someone else's possession. There was no legal obligation on Ms. Jonasson to ensure it would go to the addressee, nor any guarantee that it would be done. Even if he had an expectation of privacy, the Crown submits that Ms. Jonasson could give consent to the search being the person in possession of the envelope; that Cst. Chauvin had reasonable and probable grounds to believe that an offence may be in the process of being committed; and, in any event, the evidence discovered is real evidence, having an existence independent of any *Charter* violation, and therefore should not be excluded.

11 Having regard to these submissions, I think it would be convenient to analyze this case in the context of the following questions:

1. Did the accused have a reasonable expectation of privacy in the envelope and its contents?

2. If he did, could Ms. Jonasson give a valid consent to the search of the envelope by Cst. Chauvin?

3. If she could not, was the search of the envelope and the subsequent seizure of its contents "unreasonable" within the meaning of s.8 of the *Charter*?

4. If it was, should the evidence be excluded pursuant to s.24(2) of the *Charter*?

Reasonable Expectation of Privacy

12 Counsel for the accused reminds me of my words in *R.* v. *Ranger*, [1992] N.W.T.R. 37, where I said that the primary value served by s.8 of the *Charter* is privacy. I then borrowed from the majority judgment in *R.* v. *Duarte* (1990), 53 C.C.C. (3d) 1 (S.C.C.), where it was said that one cannot focus on the expectations of privacy of those involved in criminal activity; one must have regard to the standards of privacy to be reasonably expected by people living in a free and democratic society. If the actions of state agents would infringe upon those standards, then those agents must conform to the constitutional safeguards established to justify such intrusions.

13 The accused did not testify on the *voir dire*. His counsel submits, however, that the only reasonable inference to draw is that the accused had an expectation that the envelope would be delivered to the person to whom it was addressed. There was evidence as to how people travelling between Lutselk'e and Yellowknife would regularly take packages for other people. Counsel drew an analogy to the mail service.

14 In the recent case of *Edwards* v. *The Queen* (S.C.C. No. 24297; February 8, 1996), Cory J., on behalf of the majority, addressed this issue of a reasonable expectation of privacy in the context of a search of premises belonging to a third party. His judgment emphasizes that there are two distinct questions to address in any s.8 challenge. First, did the accused have a reasonable expectation of privacy? If he did not, then s.8 is not brought into play. If, however, that first question is answered affirmatively, then one goes on to the second question, that being whether the search or seizure was an unreasonable intrusion on that right to privacy.

15 Cory J. described the scope of a reasonable expectation of privacy by referring to the seminal decision of Dickson J. in *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145:

> While Dickson J. advocated a broad general right to be secure from unreasonable search and seizure, he stressed that it only protected a "reasonable expectation of privacy". He stated at pp. 159-60 that the limiting term "reasonable" implied that:
>
> > an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

> It has since been determined that this assessment must be made in light of the totality of the circumstances of a particular case. See, for example, R. v. Colarusso, [1994] 1 S.C.R. 20, at p. 54, and R. v. Wong, [1990] 3 S.C.R. 36, at p. 62.

16 Saying that regard must be had to the totality of the circumstances is no different than saying that a determination as to whether there exists a reasonable expectation of privacy is fact-specific: *Weatherall* v. *Canada (Attorney-General)* (1993), 83 C.C.C. (3d) 1 (S.C.C.).

17 Crown counsel refers me to various factors to be considered as outlined by Cory J. in *Edwards*:

> The factors to be considered in assessing the totality of the circumstances may include, but are not restricted to, the following:
>
> (i) presence at the time of the search;
> (ii) possession or control of the property or place searched;
> (iii) ownership of the property or place;
> (iv) historical use of the property or item;
> (v) the ability to regulate access, including the right to admit or exclude others from the place;
> (vi) the existence of a subjective expectation of privacy; and
> (vii) the objective reasonableness of the expectation.

18 Crown counsel submits that the facts in this case reveal that the accused was not present at the time of the search; he did not have possession or control of the thing searched; he could not regulate access to the envelope; and, by giving over the envelope to Ms. Jonasson, there is no objective basis for a reasonable expectation of privacy. Crown counsel argues that this case is similar to *R.* v. *Nakoneshny* (1989), 47 C.C.C. (3d) 423 (Sask. C.A.). In that case the accused was in custody charged with first

degree murder. An undercover police officer, disguised as a prisoner, was placed in his cell. Prior to the undercover officer being taken out of the cell, the accused asked him to deliver a letter he had written to a friend. The officer took the letter and promptly turned it over to the officers investigating the murder. The letter contained instructions which could be considered to be for the purpose of fabricating evidence. The court held that the accused had no reasonable expectation of privacy in the letter. Cameron J.A. wrote (at page 433):

> In all of the circumstances, such search or seizure as occurred in relation to the letter was not in our view *unreasonable* and no privacy interest was violated. We were referred to no authority suggesting the police had acted illegally, as distinct from unconstitutionally, and we do not believe that the constitutional right of privacy extends so far as to entitle a person - in the circumstances in which the accused found himself at the time he handed the letter to the undercover policeman - to communicate confidentially by written message with persons other than counsel, either by way of sending or receiving such messages. The right to communicate privately and confidentially with counsel is one thing, and nothing we have to say is intended in any way to touch that right. But the ability to communicate confidentially with others in a position to thwart the investigation or pervert the course of justice is quite another. The appellant had been charged with murder and the investigation, to his and everyone else's knowledge, was still in its primary and active stages. He took the risk of trying to pass a message to the outside, failed, and in the circumstances can have no complaint, in our opinion, about its interception and viewing by the police without their having first obtained prior judicial approval to do so - having regard for the balancing of his interests against those of the government at this stage.

19 I do not agree that the case before me is similar to *Nakoneshny*. It seems to me that a prisoner, entrusting a letter to a stranger, is in a totally different situation from someone, like the accused, not charged with a crime or under any restraint, relying on the courtesy of people known to him personally to do something that is commonly

done. What the accused did in this case, viewed objectively, was no different than what people do all the time in normal interaction. He asked someone known to him to do him a favour. I have no doubt that he expected it would be done.

20 Furthermore, with respect, it seems to me that the court in *Nakoneshny* did what courts are admonished not to do, that being, to look at the results of the seizure and to undertake a risk analysis. The *Hunter* case, noted above, held that subsequent validation cannot cure an otherwise unreasonable search. The *Duarte* case, also referred to earlier, specifically rejected a risk analysis to ascertain whether a reasonable expectation of privacy exists.

21 I recognize, however, that the risk factor may have a bearing on the significance of external circumstances. For example, it has been held that a person does not have privacy protection against seizure of an item openly visible in premises accessible to the public: *R.* v. *Fitt* (1995), 96 C.C.C. (3d) 341 (N.S.C.A.). It has been held, as well, that there is no privacy interest maintainable over something abandoned: *R.* v. *Legere* (1994), 95 C.C.C. (3d) 139 (N.B.C.A.). Another example is the use of telecommunications devices that may be overheard by others. This was the case in *R.* v. *Lubovac* (1989), 52 C.C.C. (3d) 551 (Alta. C.A.), leave to appeal to S.C.C. refused 53 C.C.C. (3d) vii. There the accused used a pager system where recorded messages could be heard by persons other than the intended recipient. The court held that there could be no reasonable expectation of privacy surrounding those messages and upheld the police seizure of tapes from the pager system's computer. McClung J.A. wrote on behalf of the court (at page

560):

> The right of security from unreasonable search arises only in circumstances where there is a reasonable expectation of privacy. A dwelling, an office, an automobile or a briefcase are good examples. But open conversations are not protected because to expect that privacy surrounds them is not reasonable.

22 I think a more appropriate analogy to the case before me is that found in *R.* v. *Dersch* (1994), 85 C.C.C. (3d) 1 (S.C.C.). In that case the accused had been involved in a serious car accident. Prior to lapsing into unconsciousness, at the hospital, he explicitly refused consent to having a blood sample taken. After he was unconscious, a doctor took a blood sample and analyzed it for alcohol content, but for valid medical reasons. Later the doctor told the police about the results of the test. The police then obtained a warrant to seize the sample. The Supreme Court of Canada held that the blood sample was inadmissible. In doing so, the majority held that, while the doctor was not an agent of the state, the patient had a reasonable expectation that any medical information, including the test results, would be kept private. The obtaining of those results by the police was analogous to a search or a seizure within the meaning of s.8 of the *Charter*. Since there was no warrant when the information was obtained, the police action was unreasonable. There was no emergency and no basis in law for the intrusion into the patient's privacy. Therefore, the results were inadmissible. It should be noted, though, that a major reason for inadmissibility was the public policy goal of protecting the confidentiality of medical information.

23 In the case before me the accused gave a sealed envelope to people he knew

with a request that it be delivered to the person named on the outside of the envelope. Implicit in that request, in my opinion, is the expectation that it would be delivered to no one else. Ms. Jonasson was not an agent of the state, so her actions are not subject to *Charter* scrutiny. Indeed, I want to make it perfectly clear that I do not think she did anything that could be criticized. In my view she did exactly what every upstanding citizen who suspects criminal activity should do, she went to the police. But, just as in *Dersch*, Cst. Chauvin obtaining the envelope was analogous to a search and seizure.

24 It cannot be doubted that when Cst. Chauvin examined the envelope by feeling it he was engaged in a search. He knew where the envelope came from and to whom it was intended, so it is not as though he was examining some mysterious found object. He could have left it alone or delivered it to the addressee. Instead, however, he too felt it. This is no different, in my opinion, from the officers described in the recent case of *Evans* v. *The Queen* (S.C.C. No. 24359; January 25, 1996) who went to the door of a home and, when it was opened, sniffed for the odour of marihuana. The act of sniffing in that case constituted a search. The act of feeling in this case, and the subsequent act of opening, constituted a search of the envelope.

25 I have concluded, based on all of the circumstances, that the accused had a reasonable expectation of privacy in the envelope. He expected that it would be delivered by Ms. Jonasson to the intended recipient; that it would be delivered to no one else; and, that it would not be opened or inspected by anyone other than the intended recipient. The activities of Cst. Chauvin, once he received the envelope, constitute a

search and seizure. The implications of the *Charter* are then brought into this analysis.

Consent to Search

26 Crown counsel submits that Ms. Jonasson, as the person in possession of the envelope, could give consent to a search of the envelope. It is argued that since there were no contractual or statutory obligations on Ms. Jonasson, there being no imposed confidentiality rule, she could hand the envelope over to Cst. Chauvin who, in turn, could then search it. Or, it was argued, she had implied authority to consent on some principle of agency or bailment. Cst. Chauvin testified that he thought he could examine it because it was given to him by Ms. Jonasson as opposed to it being part of the formal mail service or cargo transported by the air carrier. If this argument is upheld, then again the search and seizure conducted by Cst. Chauvin is beyond *Charter* scrutiny.

27 The question of whether a third party can give a valid consent to a search has been discussed in a number of cases. Generally speaking, for a consent to be valid, it must be voluntary and informed both as to the right to refuse consent and as to the potential consequences of giving consent: *R.* v. *Wills* (1992), 70 C.C.C. (3d) 529 (Ont. C.A.). For that reason, it is rare to find any situation where it can be said that a third party effectively gave consent to some intrusion into someone else's constitutional rights. In *R.* v. *Mercer* (1992), 70 C.C.C. (3d) 180 (Ont. C.A.), it was held that the manager of a hotel could not consent to a search of a guest's room. In that case, the court recognized the guest's privacy interest in the room, albeit temporary, and cautioned against importing civil concepts such as apparent authority or agency into the criminal law

sphere. In *R.* v. *Blinch* (1993), 83 C.C.C. (3d) 158 (B.C.C.A.), the court held that a neighbour, who possessed a key to the accused's home, could not legitimately consent to a search of the home. The court there said that a third party cannot effectively waive the constitutional rights of an accused.

28 In my opinion, Ms. Jonasson could not effectively consent to a search of the envelope. There was no authority, express or implied, for her to do with the envelope as she pleased. I therefore reject this aspect of the Crown's submission.

Unreasonable Search or Seizure

29 Cst. Chauvin examined and opened the envelope and seized its contents without the benefit of any prior authorization. A search without a warrant is *prima facie* unreasonable. The significance of this was explained most recently by Sopinka J. writing on behalf of the majority in the *Evans* case:

> According to this Court in *Hunter* v. *Southam Inc., supra*, a warrantless search is *prima facie* unreasonable. In other words, a warrantless search is presumed to be unreasonable unless the party seeking to justify the search can "rebut this presumption of unreasonableness" (*Hunter, supra*, at p.161). According to this Court in *R.* v. *Collins*, [1987] 1 S.C.R. 265, at p.278, in order to rebut the presumption of unreasonableness the Crown must establish three things, namely (1) that the search was authorized by law, (2) that the law authorizing the search was reasonable, and (3) that the manner in which the search was carried out was reasonable. Only where these three criteria are met is the "presumption of unreasonableness" rebutted: in all other cases, a warrantless search infringes s.8 of the *Charter*. (emphasis in original)

30 In the present case, the *manner* in which the search and seizure were carried

out is unobjectionable. The accused was totally unaware of it. But I am not satisfied that the first two criteria have been met.

31 The *Narcotic Control Act*, R.S.C. 1985, c. N-1, in section 10, provides that places, other than dwelling houses, may be searched and things seized without the necessity of a warrant under the circumstances specified in that section. Notwithstanding that, the Supreme Court of Canada has held that, to be consistent with the values enshrined in s.8 of the *Charter*, that section must be read as authorizing a warrantless search only where exigent circumstances render it impracticable to obtain a warrant: *R.* v. *Grant* (1993), 84 C.C.C. (3d) 173. Here, on the evidence of Cst. Chauvin, there were no exigent circumstances. And there was no evidence indicating that Cst. Chauvin lacked the facility to obtain a warrant in Lutselk'e.

32 I have already held that the accused had a reasonable expectation of privacy and that Ms. Jonasson could not effectively consent to Cst. Chauvin's search of the envelope. The search by Cst. Chauvin was conducted without a warrant. There were no exigent circumstances. Therefore, the search was not authorized by law. The question of the law being reasonable does not arise in this situation. Since the Crown has failed to satisfy all of the criteria referred to by Sopinka J. in the extract quoted above, the search was "unreasonable" and thus contrary to s.8 of the *Charter*.

Exclusion of the Evidence

33 The conclusion that the search was unreasonable leads to a consideration

of whether the evidence obtained as a result of that search, the marihuana, should be excluded. Evidence, even if it is obtained in a manner that infringed the accused's constitutional rights, is to be excluded pursuant to s.24(2) of the *Charter* only if it is established that, having regard to all the circumstances, its admission in the accused's trial could bring the administration of justice into disrepute. The test for determining this was summarized in *R.* v. *Jacoy*, [1988] 2 S.C.R. 548, at pages 558-559:

> First, the court must consider whether the admission of evidence will affect the fairness of the trial. If this inquiry is answered affirmatively, "the admission of evidence would tend to bring the administration of justice into disrepute and, subject to a consideration of other factors, the evidence generally should be excluded" [*Collins, supra*] (at p.284). One of the factors relevant to this determination is the nature of the evidence; if the evidence is real evidence that existed irrespective of the *Charter* violation, its admission will rarely render the trial unfair.
>
> The second set of factors concerns the seriousness of the violation. Relevant to this group is whether the violation was committed in good faith, whether it was inadvertent or of a merely technical nature, whether it was motivated by urgency or to prevent the loss of evidence, and whether the evidence could have been obtained without a *Charter* violation.
>
> Finally, the court must look at factors relating to the effect of excluding the evidence. The administration of justice may be brought into disrepute by excluding evidence essential to substantiate the charge where the breach of the *Charter* was trivial. While this consideration is particularly important where the offence is serious, if the admission of the evidence would result in an unfair trial, the seriousness of the offence would not render the evidence admissible. (emphasis in original)

Fairness of the Trial

34 Considering all of the circumstances in this case, I cannot conclude that the

admission into evidence of the marihuana found in the envelope would render the accused's trial unfair. The evidence is real evidence that existed irrespective of the *Charter* violation. The accused was not in any way conscripted against himself in the creation or discovery of this evidence. Indeed, he set in motion the chain of events leading to its discovery. He chose to rely on Ms. Jonasson to deliver the envelope. Other lawful investigative techniques were available to the police including allowing the envelope to be delivered and then setting up surveillance. This was real, discoverable evidence, as those terms have been used in numerous authorities, and the fairness of the trial would not be affected by its admission.

Seriousness of the *Charter* Violation

35 The violation in this case was committed essentially because the police officer thought he could open the envelope because it was given to him by Ms. Jonasson and because he did not stop to think of either the implications of his actions or whether there were alternatives available to him so as to assure the lawfulness of his actions. It is difficult therefore to characterize the police conduct as being done in good faith; but it was not deliberate bad faith. It was certainly not a technical violation. There was no urgency. All of these factors make the violation more serious.

36 Counsel for the accused, in discussing this category, refers again to my previous judgment in the *Ranger* case. That case involved surveillance and interception of mail by postal authorities working in conjunction with the police. I adopted then the propositions that the general population would consider interference with private mail to

be very serious and would not, except in extreme circumstances, expect that evidence obtained through unauthorized searches of private mail would be admitted into evidence against either the sender or the recipient. I still hold to that view. But I do not find the analogy to private mail to be persuasive in this case.

37 The practice of sending packages back and forth by friends and acquaintances may be quite common, but this informal method lacks the structure, controls, and statutory requirements of confidentiality associated with the mail service. It is purely private activity beyond the regulation of governments or courts (assuming of course the absence of illegal activity).

38 A more substantial argument is raised when one considers whether the evidence could have been obtained without a *Charter* violation and, specifically, whether Cst. Chauvin could have obtained a warrant at the time when the envelope came into his possession. Whether Cst. Chauvin sought a warrant under the *Narcotic Control Act* or the *Criminal Code*, the requirement would be the same: reasonable and probable grounds. The defence submits here that there were no reasonable and probable grounds to search the envelope; all that existed was mere suspicion.

39 The Alberta Court of Appeal recently considered this particular question in *R.* v. *Love* (1996), 102 C.C.C. (3d) 393. In that case police undercover officers were sharing premises with the accused, thus enabling them to surreptitiously gather physical evidence for analysis. The court considered the likelihood of a warrant being granted to cover the activity carried out by the police. Kerans J.A., on behalf of the court, expressed

grave reservations about this type of analysis (at page 413):

> One might well question the wisdom of an attempt to guess what success the police may have had in seeking a warrant when in fact they did not seek one. We are at risk in this endeavour of establishing a rule that the police do not need to get a warrant in any case where they could get one if they would ask. This approach would obviously make it easier for officials to go ahead without a warrant...
>
> In any event, this "chance of a warrant if only they had asked" assessment is precisely the sort of analysis undertaken by Cory J. in *Silveira*. In that case, the police followed Silveira to a house where they had reasonable grounds to believe he stored drugs for sale. They entered without a warrant and "secured" the premises until they obtained one. The problem about a warrant, of course, was one of timing, given the admitted need to move quickly. Cory J. considered what the police might have done, and what a justice of the peace might have done. He concluded that the police could have got a telephone warrant, and thus the drugs would have, in any event, been lawfully seized. In concluding that a warrant would have been available, he urged an expansive view of the warrant powers. He thus seemed to confirm the idea of the notional warrant, as well as the idea of expanded warrant powers.

40 The case referred to in the second paragraph just quoted is *Silveira* v. *The Queen* (1995), 97 C.C.C. (3d) 450 (S.C.C.). That case, involving a police raid on a dwelling house to secure the premises while a warrant was obtained, is sufficiently unusual in its exigent circumstances that it is not relevant to the case before me. The approach, however, of considering the likelihood of success in obtaining a warrant, if one had been sought, is relevant. I should note, though, that in this regard I share the concerns expressed by Kerans J.A. in the quoted extract from the *Love* case.

41 I should also note, before continuing, that Kerans J.A. made his comments in the context of the effect of admission on the fairness of the trial. I think this question

is more appropriately considered under the category of the seriousness of the violation as I propose to do here (and as was done in the *Silveira* case).

42 The defence submits that all the police officer had in this case was suspicion. As such, the *Charter* violation is very serious. As stated by Sopinka J. in *R.* v. *Kokesch* (1990), 61 C.C.C. (3d) 207 (S.C.C.), at page 227: "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."

43 When judges refer to reasonable and probable grounds, we refer to that state of belief in which mere suspicion is transformed into a reasonable probability. The *Hunter* case enunciated the test of "credibly-based probability" as the threshold for subordinating the expectation of privacy to the needs of law enforcement.

44 In this case the totality of the information possessed by Cst. Chauvin must be taken into account. At the moment when the officer sat in his office with the envelope he (a) knew that the accused had asked Ms. Jonasson to carry the envelope; (b) knew from Ms. Jonasson that the contents felt suspicious; (c) knew that the accused had been the subject of intelligence gathered in the past in connection with alleged narcotics and alcohol offences; and (d) knew that the intended recipient had been the subject of past tips alleging involvement in narcotics trafficking. Once he felt the envelope, his suspicions were heightened. But, in my opinion, even before he felt the envelope, he had sufficient information linking the sender and the recipient of the

envelope with allegations of involvement in the drug trade so as to start moving his suspicions into the realm of credibly-based probability.

45 There was no evidence before me as to the reliability of the sources who supplied the intelligence information to the police. I should not make any assumptions therefore as to whether it would be considered reliable source information. But, based on the evidence I do have, I am satisfied that the officer had more than mere suspicion. He was on his way to establishing that credibly-based probability which would provide grounds for the issuance of a warrant. I think there is a good likelihood that Cst. Chauvin could have obtained a warrant if he had tried. This, in my opinion, and in the particular circumstances of this case, attenuates the seriousness of this *Charter* violation. It does not validate the search, but it is a factor for consideration.

Effect of Exclusion

46 In my opinion, the exclusion of the evidence in this case would damage the public perception of the administration of justice to a much greater extent than would its admission. Let us step back and take an objective look at the scenario presented in this case.

47 The accused tried to use a couple who were known to him to transport this envelope for him. He involved innocent people in the transport of narcotics. The distribution of narcotics is serious business indeed, especially when one considers its prevalence even in small communities across the north. Ms. Jonasson became suspicious

and to her credit gave the envelope to the police. Cst. Chauvin opened the envelope and located the marihuana. This was done admittedly in violation of the accused's constitutional rights. But, balancing that against the entire sequence of events, and the fact that the evidence is necessary to substantiate the charge against the accused, in my opinion, the public confidence in the administration of justice would be more harmed by its exclusion than by its admission.

Conclusions

48 I have concluded that, although the evidence at issue in this case was obtained in a manner that violated s.8 of the *Charter*, the admission of this evidence would not bring the administration of justice into disrepute. Accordingly, the evidence is admissible. The accused's application is dismissed.

49 I thank counsel for their able submissions.

John Z. Vertes
J.S.C.

Yellowknife, Northwest Territories
March 18, 1996

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