Date: 2020 05 15
Docket: S-1-CR-2018-000 130

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

-and-

TALAL KHATIB

Applicant

RULING ON APPLICATION TO EXCLUDE EVIDENCE

I) INTRODUCTION

[1] Talal Khatib is facing trial on charges of being in possession of cocaine for the purpose of trafficking and being possession of proceeds of crime. These charges were laid as a result of the execution of a search warrant at 22 Kugmallit Road in Inuvik in October 2017.

[2] Mr. Khatib filed an Application pursuant to the *Canadian Charter of Rights and Freedoms* (the *Charter*) seeking the exclusion of the evidence obtained during the search. At the hearing of the Application, Cst. Ian Main testified about the investigation and the preparation of the Information to Obtain (ITO) that he swore when he applied for the search warrant.

[3] Mr. Khatib argues that the ITO was incomplete and misleading in several respects. He argues that once the errors are removed and certain necessary contextual information is taken into account, the grounds were insufficient to

support the issuance of the warrant. He argues that the search contravened Section 8 of the *Charter* and that any evidence obtained as a result of it should be excluded pursuant to Section 24(2) of the *Charter*.

11) LEGAL FRAMEWORK

[4] The legal framework that governs this Application is not contentious. As noted by counsel, it was summarized in a very helpful manner in *R v Clow*, 2012 ABQB 656.

[5] The standard that must be met for a search warrant to issue is well established: the issuing justice must be satisfied by information under oath that there are reasonable and probable grounds to believe that an offence has been committed and that there is evidence to be found at the place to be searched. This standard involves "the point where credibility-based probability replaces suspicion" *Clow*, paras 9-10.

[6] The affiant's grounds must be based on facts. They can be based on the affiant's personal knowledge or on information provided to the affiant by others. The standard, however, is not simply subjective. The affiant's mere assertion that he or she believes the grounds exist is not sufficient. The ITO must, in the totality of the circumstances, disclose a substantial basis for that belief. *Clow*, paras 11-13.

[7] To the extent that the affiant relies on information provided by others, the strength of that information must be weighed taking into account whether it was compelling, whether it was credible, and whether it was corroborated. The totality of the circumstances must be considered to determine whether the information provided is capable of assisting in forming reasonable grounds. *R v Debot*, [1989] S.C.J. No.118, para 53.

[8] In swearing an ITO, an affiant is under a duty of full, fair and frank disclosure. This means that all material facts must be included, whether they are favourable or not to the affiant's case. The case must be stated plainly, without misleading statements or exaggerations. R v *Araujo*, 2000 SCC 65, paras 46-47; R v *Kelly*, NBCA 89, para 51; *Clow*, para 8.

[9] A search warrant is presumed to be valid. The onus is on the challenging party to establish on a balance of probabilities that it ought not to have issued.

[10] If a warrant is challenged, the review process is not a *de novo* assessment. If the reviewing judge concludes that the issuing judge could have issued the warrant, the reviewing judge should not interfere. *Clow*, para 17. In other words, the

question is not whether the reviewing judge, presented with the same information, would have issued the warrant. The proper question to be asked is whether there was reliable evidence that might reasonably be believed on the basis of which the issuing justice *could* have issued the warrant. *Araujo*, para 54; R v *Morelli*, 2010 SCC 8, para 40; see also *R v James*, 2019 ONCA 288, para 52 (dissenting Reasons of Nordheimer JA, adopted by the Supreme Court of Canada in *R v James*, 2019 SCC 52).

[11] A reviewing court's analysis is not limited to the ITO itself. If the evidence at the *voir dire* discloses errors in it, or a failure to disclose a material fact, this does not automatically vitiate the warrant. Erroneous or misleading information must however be excluded from the analysis as to the sufficiency of the grounds. Additional details that emerge from the *voir dire* may also inform the extent to which certain statements in the ITO may have been misleading and whether, in context, there were sufficient grounds for the warrant to issue. The reviewing court may also, on the basis of evidence presented at the *voir dire*, correct minor errors in the ITO that were made in good faith. This process is referred to as "amplification". *Araujo*, para 58; *Morelli*, para 41; *Clow*, para 23.

[12] Amplification must be used sparingly. It cannot be used to correct errors stemming from an attempt by the affiant to mislead the issuing justice. It also cannot be used to add substantive information that ought to have been included in the ITO, as this would amount to after-the-fact justification for the issuance of the warrant. *Araujo*, para 59; *Morelli*, paras 42-43.

[13] The reviewing court must consider the totality of the circumstances, as opposed to focusing on isolated passages of the ITO. The analysis is contextual and must be approached on a practical, non-technical basis, recognizing that issuing justices are entitled to draw common sense inferences from the information contained in the ITO. The question to be answered is whether there was reliable evidence that might reasonably be believed on the basis of which the warrant could have issued. *Clow*, para 25.

[14] I would add that the reviewing court also has the discretion to set aside a search warrant, even if the grounds were sufficient, if the court is satisfied that the conduct of the police amounted to a subversion of the pre-authorization process. *R v Morris* (1998), 134 CCC (3d) 539 (N.S.C.A.); *Araujo*, para 54; *R v Paryniuk*, 2017 ONCA 87, para 66. While this was invoked as one of the reasons to set aside the search warrant in the Notice of Motion that Mr. Khatib filed on October 30, 2019, he abandoned that line of argument at the conclusion of the *voir dire*. In my view, that was a realistic and fair concession in light of the evidence.

III) ANALYSIS

1. Errors and inaccuracies raised by Mr. Khatib

[15] The ITO begins with introductory paragraphs that include definitions, information about the various police officers mentioned in the document, and a description of the databases that were used in the investigation.

[16] Paragraphs 5 to 25 set out the grounds for Cst. Main's belief. These grounds include reference to anonymous complaints received by the Inuvik R.C.M.P. (in August 2017) and by the mayor of Inuvik (in September 2017) about Mr. Khatib illegally selling liquor and drugs from his residence; observations made of several people attending 22 Kugmallit Road and engaging in hand-to-hand exchanges with Mr. Khatib; information that Cst. Main received from named citizens of Inuvik suggesting suspicious activities at 22 Kugmallit Road and that Mr. Khatib was selling drugs at that address. The ITO also outlines charges that were laid against Mr. Khatib between 2008 and 2017, most of which were later stayed by the Crown.

[17] Mr. Khatib raises a number of concerns about the ITO.

a) Date that the ITO was sworn

[18] The first issue has to do with confusion about the date when the ITO was sworn.

[19] The investigation began on October 4, 2017. Cst. Main testified that he drafted the ITO over a period of time, adding elements to it as the investigation continued and generated additional information. Cst. Main was not working solely on this investigation. He was also attending to other general police duties and calls for service during this period of time.

[20] The swearing date that appears on the last page of the ITO is October 18, 2017. However, paragraph 20 of the ITO refers to surveillance conducted on October 19, 2017. This means that either the ITO was not sworn on October 18, or that the information about the October 19 surveillance was added to the document after it was sworn.

[21] A typographical error as to the swearing date may well be the type of technical error that can be cured through the process of amplification, referred to above at Paragraphs 11 and 12. This could only be done in this case if the

evidence established that the discrepancy was indeed the result of a simple typographical error. Such is not the case. Cst. Main's evidence about when he swore the ITO was contradictory and ultimately quite confusing.

[22] In Examination-in-Chief, he testified that the ITO was sworn on October 18. Crown counsel drew his attention to the reference to the October 19 surveillance and asked if he could account for this discrepancy. Cst. Main answered:

> (...) the only thing I can think of is that I indicated October 18 when, in fact, it should have reflected the 20th of October, the same day the application was made.

[23] Crown counsel then had Cst. Main refresh his memory by referring to entries he made in his "general reports". General reports are essentially running notes that police officers create using the R.C.M.P.'s computer system. My understanding of the evidence is that usually, a general report is created for each investigation and gets updated with additional notes as the investigation progresses.

[24] For this investigation Cst. Main created two general reports. He explained that he created the first one in the usual course and entered notes in it. For an unknown reason, that report became "locked" in the system such that it could no longer be updated with new notes. This was why Cst. Main created the second one.

[25] Cst. Main testified he noted the date of the swearing of the ITO in this second report. After having refreshed his memory with the report, he testified that the ITO was completed on October 20, 2017, the same day the search warrant was issued.

[26] However, in Cross-Examination, Mr. Khatib's counsel asked questions about this issue, suggesting that perhaps the ITO was not in fact sworn on October 20:

> Q. Constable Main, I'm going to suggest to you that you did swear the ITO on October 18th but then did make some additional surveillance observations on October 19th.
>
> A. Okay. Yeah, I can't refute that. I - - I can't say with certainty that that was not the case.

[27] In light of this evidence, considerable confusion remains about the date on which the ITO was sworn. The evidence leaves open the possibility that the details about the October 19 surveillance may not have been part of the document that was sworn, but were added after the fact. This is not the type of error that can be cured through amplification.

[28] That being so, I conclude that for the purposes of my analysis of the sufficiency of the grounds, the information included at paragraph 20 of the ITO, dealing with the observations made during the October 19 surveillance, must be disregarded.

b) Status of charges that Mr. Khatib was facing in October 2017

[29] At paragraph 23 of the ITO, Cst. Main sets out the results of queries he made about Mr. Khatib, using the R.C.M.P.'s Police Reporting and Occurrences System (PROS). Subparagraph 23(h) reads as follows:

> Talal was arrested on January 1, 2017 and charged with possession for the purpose of trafficking of cannabis marihuana, cocaine and salvia, possession of a weapon for dangerous purpose and failing to comply with condition of undertaking or recognizance.

[30] Cst. Main was aware that if he referred to charges that had been dismissed or stayed, it was important to make that clear. He did so with respect to the charges he referred to at paragraphs 23(d) to (g). By contrast, paragraph 23(h) simply refers to Mr. Khatib being charged. It leaves the impression that those charges are still pending.

[31] When he was cross-examined about his understanding of the status of the January 2017 charges at the time he swore the ITO, Cst. Main testified that he understood, at the time, that they were all still outstanding. Mr. Khatib's counsel then referred Cst. Main to a note in one of the general reports where he indicated that the cannabis and trafficking cocaine charges were pending and the remaining ones were withdrawn. Cst. Main acknowledged his error, and that the ITO did not in fact reflect his understanding of matters at the time.

[32] As it turns out, what Cst. Main recorded in the general report was not entirely accurate. Copies of court records filed as an exhibit on the *voir dire* show that Mr. Khatib was ordered to stand trial on the 5 charges on June 6, 2017. On September 8, 2017, Crown filed an Indictment that included two charges (possession of cocaine for the purpose of trafficking and possession of marihuana for the purpose of trafficking). The three other charges remained unindicted, but were not stayed or withdrawn.

[33] Mr. Khatib argues that irrespective of the actual status of the unindicted charges, what matters is that Cst. Main believed that they were withdrawn and should have included this information in the ITO. He argues that the reference to the January 2017 charges in paragraph 23(h) of the ITO should be disregarded in analyzing the sufficiency of the grounds. In the alternative, he argues that the

additional information about the status of the 3 unindicted charges should be taken into account.

[34] In my view, Paragraph 23(h) of the ITO is not misleading. It does leave the impression that all 5 charges were still pending in October 2017, but technically that was correct. Mr. Khatib had not been discharged on any of them. None had been stayed. It would have been open to the Crown to file a new Indictment including all 5 charges.

[35] In some circumstances, a discrepancy between what an affiant records in police notes and what he or she includes in an ITO may be significant, irrespective of whether the information recorded in the notes was correct. For example, in a case where bad faith is alleged, it could be quite significant. But here, Mr. Khatib is not suggesting any bad faith on Cst. Main's part. The only issue is whether the ITO, as drafted, was misleading to the issuing justice. On this point, in my view, it was not.

c) Failure to provide particulars of criminal records

[36] The third concern raised by Mr. Khatib is that Cst. Main provided incomplete information about the criminal records of certain individuals mentioned in the ITO.

[37] At paragraph 16 of the ITO, Cst. Main deposes that he observed a vehicle registered to David Koe parked at 22 Kugmallit Road. He deposes that Mr. Koe "has been charged with possession of cannabis marihuana and has been the subject of complaint on investigations involving trafficking cannabis marijuana".

[38] Mr. Koe had a criminal record at the time. It included convictions for assault and one conviction for possession of a controlled substance, but no conviction for drug trafficking. Neither the existence of Mr. Koe's criminal record nor its particulars were included in the ITO.

[39] In addition, at paragraphs 17 and 18 of the ITO, Cst. Main deposes that he received information from Christina Kasook, including things that her son Otto Kasook told her. Ms. Kasook told Cst. Main that Otto told her he had a conversation with Mr. Khatib. Paragraph 17 reads in part:

> (...) Otto then asked Talal for a "front" as a means of distracting from his original motivation for being present on the premises. Talal reportedly told Otto he would sell Otto an ounce on Thursday or Friday for $300.00 as that is when his shipment was arriving.

[40] At paragraph 18 Cst. Main deposes that Otto Kasook has a criminal record but does not provide the particulars of that record.

[41] Mr. Kasook's criminal record was filed at the *voir dire*. It includes convictions as a youth for property crimes and failure to appear, as well as adult convictions for crimes of violence, driving offenses, and convictions for failure to comply with court orders. There are no convictions for drug offenses.

[42] Mr. Khatib argues that Cst. Main's treatment of Mr. Koe's and Mr. Kasook's criminal records in the ITO was misleading. He argues that the fact that Mr. Koe did not have any convictions for drug trafficking could have affected the significance that the issuing justice might place on his vehicle being observed at 22 Kugmallit Road. With respect to Mr. Kasook, he argues that the details of his record provide context for information relayed to Cst. Main by his mother.

[43] Mr. Khatib suggests that the remedy for these errors is either to remove references to these individuals from the ITO or, in the alternative, to take the particulars of the criminal records into account in my analysis of whether sufficient grounds existed to issue the warrant.

[44] When he was questioned about this, Cst. Main acknowledged that the particulars of the criminal records of these individuals should have been included. Clearly that is the best practice and in some cases, the failure to include those particulars is misleading. For example, in *R v Byland*, [2017] N.W.T.J. No 10, the court concluded that the failure to mention that a named informant had a criminal record including convictions for forgery, public mischief and fraud, was misleading and, ultimately, fatal to the validity of the warrant.

[45] In that case, the grounds to obtain the warrant were entirely based on the account of the named informant who claimed that the accused had showed him pornographic materials. The court concluded that in light of some other concerns about the reliability of the informant's account, the fact that the informant had a criminal record for serious crimes of dishonesty rendered the grounds insufficient to form the basis for the issuance of the search warrant.

[46] In this case, the criminal records at issue do not include what I would consider a "serious crime of dishonesty". Although particulars ought to have been included, I do not think that this shortcoming was particularly misleading. In fact, with respect to Mr. Koe's record, reference to the particulars of his record may have made the grounds stronger, as the issuing justice, in addition to knowing Mr. Koe had been the subject of complaints and investigation about his involvement

with drugs, would have known he had actually been convicted for possession of drugs.

[47] As for Mr. Kasook, while some of his convictions for property offenses may be considered crimes of dishonesty, broadly speaking their impact on his credibility and the reliability of what he told his mother is not at all as significant as the information that was omitted in *Byland*.

[48] Because the particulars of the records should have been included, for the purposes of my assessment of the sufficiency of the grounds, I have taken them into account as part of the overall context. However, in my view, their impact on the analysis is minimal.

d) Incomplete information regarding Lliam Wood's complaint

[49] At paragraph 14 of the ITO, Cst. Main outlines information that he obtained from Lliam Wood, whose residence is 20 Kugmallit Road. Mr. Wood described "pervasive foot and vehicle traffic" at 22 Kugmallit Road, involving short visits and people often approaching a window and making what appeared to be hand-to-hand exchanges with the resident of the premises.

[50] In cross-examination, Cst. Main acknowledged that he was aware that Mr. Khatib had moved into 22 Kugmallit Road on August 30, 2017. He also acknowledged that in the formal statement Mr. Wood gave on October 15, he told Cst. Main that the problems at 22 Kugmallit Road had been going on for "a couple of months", and that there were two people living at 22 Kugmallit Road. In Re-Examination Cst. Main was asked to clarify what Mr. Wood said about the timeline of the suspicious activities that he was complaining about. Cst. Main referred to Mr. Wood's statement and testified that Mr. Wood's words were "I don't even know how long. It's been a couple of months I would say. Um. I'm not sure exactly though".

[51] Mr. Khatib argues that Cst. Main omitted important information in the ITO in that he did not mention that Mr. Wood said that two people were living at this residence, and he did not mention how long Mr. Wood said suspicious activities had been going on. Mr. Khatib argues this is significant because this information could suggest that the suspicious activities at 22 Kugmallit Road started before he moved there.

[52] Mr. Khatib argues that these misleading omissions can be cured by either disregarding the references to Mr. Wood's complaint in the analysis of the sufficiency of the grounds, or in the alternative by considering the information Mr.

Wood provided in light of the additional details and context that emerged from Cst. Main's testimony.

[53] I agree that Cst. Main should have been more precise in the ITO. Mr. Wood's report that two persons lived at 22 Kugmallit Road was a relevant fact that should have been included. The evidence about how long he had observed suspicious activity at the residence is somewhat equivocal, but should probably have been included as well, given Mr. Khatib's relatively recent move to that residence.

[54] I have included these additional facts in my assessment of the sufficiency of the grounds.

e) Insufficient details about the circumstances of the surveillance

[55] Mr. Khatib argues that Cst. Main should have included more detailed information about the surveillance, including the times of day, the fact that the surveillance occurred during hours of darkness, and precisely where the officers were located when they made their observations. These, Mr. Khatib argues, were important details to enable the issuing justice to determine how reliable and compelling the observations were.

[56] The evidence of Cst. Main about those details leads me to the conclusion that while the information could have been more detailed, what was included was not misleading. Cst. Main explained that he had a good view of what was being observed, that on those occasions where he saw Mr. Khatib at the window, there was a light illuminating the area and he could clearly see what was happening even though the surveillance was being conducted during hours of darkness. None of the clarifications that came from his evidence undermine the weight of what he deposed to in the ITO. On the contrary, had some of those details been included, they would have made the information about the things observed during the surveillance more compelling.

[57] As noted above, the process of amplification cannot be used to add substantive information that would bolster the strength of the ITO. For example, the Crown cannot bolster its case defending the warrant by relying on the fact Cst. Main testified that he was using binoculars, or the additional details he provided about precisely what he observed, or his testimony about past experience he'd had observing hand-to-hand transactions.

[58] At the same time, where an accused who challenges a warrant asks that aspects of the evidence be included in the analysis to provide additional context,

the reviewing court must guard against taking into consideration only isolated elements that will make the overall picture misleading.

[59] Here, Mr. Khatib seemed to suggest that some of the additional context should be taken into account in the analysis of the sufficiency of the grounds, but only the aspects that assist him. This would mean, for example, taking into account Cst. Main's evidence that the surveillance took place during the hours of darkness, thereby suggesting his ability to observe things was impeded, but not his explanation for why, even in the dark, he was confident about the accuracy of his observations. Similarly, Mr. Khatib would have this Court take into account how far Cst. Main was from the residence when he made his observations, but not the fact he was using binoculars.

[60] The Crown is not entitled to use the amplification process to rely on the additional "favourable" details that arose in Cst. Main's evidence, but the Defence cannot ask the Court to take into account "unfavourable" details in isolation from the full context. Doing so would distort reality and lead to an overall misleading picture.

[61] The ultimate question is whether the missing details about the surveillance resulted in misleading the issuing justice. I do not think that is the case.

f) Conclusions on alleged errors and inaccuracies

[62] In summary, for the purposes of my analysis of the sufficiency of the grounds, I have disregarded the reference to the surveillance conducted on October 19. That is the only information that should be excised from the ITO.

[63] I have taken into account, as well, some of the additional contextual evidence adduced during the *voir dire*. This includes the particulars of the criminal records of Otto Kasook and David Koe, and the additional details about Mr. Wood's complaint, namely, the timeline of his observations of suspicious activities at 22 Kugmallit Road and his report that 2 people lived at that residence.

2. The sufficiency of the grounds

[64] As noted above at Paragraph 5, the standard of reasonable and probable grounds involves the point where credibility-based probability replaces suspicion. The grounds must also be based on facts, not mere assertions of the affiant's belief.

[65] Mr. Khatib argues that although Cst. Main had the subjective belief that evidence of drug trafficking activities would be found at the residence, there was no objective basis for that belief.

[66] I agree with Mr. Khatib that some of the elements included in the ITO are of very little use. With respect to anonymous complaints received by the police and the mayor, for example, there were virtually no details or corroboration.

[67] The information relayed to Cst. Main by Christina Kasook was in the nature of multi-layered hearsay, as she was relaying information conveyed to her by her children. Still, it was quite specific: Ms. Kasook's daughter told her that she went to 22 Kugmallit Road because it was a place where she could find what she needed to get high. Her son told her he had a discussion where Mr. Khatib said he could sell him a specific quantity for a specific price, and made reference to when he was receiving his shipment. It would be open to the issuing justice to draw the inference that this was a discussion about illicit drugs. It would not, on its own, be sufficient to form the basis to issue a warrant, but it is part of the overall context.

[68] The observations relayed by Mr. Wood about pervasive foot traffic and many persons attending the residence for very short visits would not be determinative on their own either, but they constitute another piece of the overall picture. While I agree that the evidence about the precise timeline is somewhat equivocal as to when these activities began, it is clear that they continued to be observed after Mr. Khatib moved to 22 Kugmallit Road.

[69] The ITO also outlines several occasions where Mr. Khatib was observed engaging in what appeared to be hand-to-hand transactions with various individuals. Overall, for relatively short periods of surveillance, a high number of apparent hand-to-hand transactions were observed.

[70] Mr. Khatib notes that none of the people involved in those transactions were arrested when they left the area of 22 Kugmallit Road, such that there is no direct evidence that these transactions were drug related. Relying on *R v Quilop*, 2017 ABCA 70, he argues that the fact that a person has engaged in brief hand-to-hand transactions cannot be assumed to mean the person is engaged in illegal activities.

[71] One of the issues in *Quilop* was whether police had sufficient grounds to arrest the accused. The arresting officers relied in part on surveillance information which consisted of three observations. In the first, the suspect was seen getting into a car, exiting it a minute later, and running down the street to a nearby law office. In the second, he was seen leaving an apartment building with another

person, driving away and parking by a residential address. A man came out of the residence, got in the car, and left it a few minutes later with an object in his hand the size of a baseball. The third observation was made an hour later. The suspect was seen entering an apartment carrying a pouch case with him, and coming out six minutes later, still carrying the pouch case. At that point, a decision was made to arrest him.

[72] In concluding that the grounds were insufficient, the Court of Appeal of Alberta, among other things, commented about brief transactions and the fact that they are not necessarily suspicious:

> The Crown argued that it would be difficult to imagine an innocent explanation for what the police observed. We disagree. People buying and selling items online, from small collectibles to hockey tickets, for example, often conduct transactions in their homes or cars or on the street. And such transactions can be extremely brief where the parties have previously agreed on price or where the transaction is conditional upon a cursory inspection by the buyer.

Quilop, para 32.

[73] The Court also noted that the observations were of extremely short duration; that no hand-to-hand exchanges were observed; and that there was nothing connecting the persons the accused met or the residence he visited to known drug dealers. *Quilop*, para 31.

[74] The situation here is very different. As I already noted, the surveillance conducted on October 6th, 7th, 10th, and 14th was for relatively short periods of time. Yet, Mr. Khatib was observed being involved in numerous hand-to-hand transactions, through his window, with various individuals who attended 22 Kugmallit Road.

[75] Cst. Main observed a further hand-to-hand transaction involving Mr. Khatib and an individual who, based on Cst. Main's search of PROS, had been the subject of a complaint involving trafficking of marihuana and cocaine.

[76] Because none of the buyers were intercepted after any of the hand-to-hand exchanges, there was no direct evidence that the subject-matter of any of those transactions were drugs. But that fact did not need to be established conclusively in the ITO.

[77] The observations made during the surveillance were consistent with Mr. Wood's complaint of pervasive foot traffic at the residence. Christina Kasook's daughter reportedly told her this was a residence she could "get some stuff to get

high". Her son told her Mr. Khatib told him he "could sell him an ounce for $300.00". Mr. Khatib had been investigated and charged in relation to drug trafficking several times in the past, though those matters did not go to trial. He was facing drug trafficking charges in October 2017.

[78] In my view, on the whole, there was an ample basis for the issuing justice to issue the search warrant. I conclude that there was no breach of Section 8 of the *Charter* in this case.

3. Section 24(2)

[79] Even if I am mistaken in my assessment of the validity of the search warrant, I would have concluded, in any event, that the evidence should not be excluded.

[80] The legal framework that governs an application to exclude evidence pursuant to Section 24(2) of the *Charter* is well established and requires consideration of three factors: the seriousness of the state-infringing conduct; the impact on the *Charter*-protected interests of the accused; and society's interest in an adjudication of the case on the merits. *R v Grant*, 2009 SCC 32.

a) Seriousness of the state-infringing conduct

[81] Mr. Khatib does not allege that Cst. Main acted in bad faith. He argues that the level of carelessness shown in the preparation of the ITO nonetheless amounts to unacceptable police conduct and should be viewed as serious.

[82] Here, even assuming that all the errors raised by Mr. Khatib were in fact errors, were misleading, and that there were insufficient grounds for the warrant to issue, I would still place this case at the less serious end of the spectrum of state-infringing conduct.

[83] First, this was not a warrantless search. It was not a situation where agents of the state ignored Mr. Khatib's rights or were cavalier about respecting them.

[84] Second, although errors were made, Cst. Main was not careless in preparation of the ITO. He outlined all the steps of the investigation. He provided information about the various people referred to in the ITO and about the databases he consulted to assist in his investigation. He provided information about the civilians whose information he relied on. He conducted surveillance on several occasions and waited until he felt he had sufficient grounds before applying for the warrant. He did not demonstrate a careless or negligent attitude toward Mr. Khatib's rights.

[85] I agree that drafting errors and omissions that are misleading may constitute serious police conduct for the purposes of the Section 24(2) analysis, even when there is no deliberate intention to mislead. *R v Dhillon*, 2010 ONCA 582, which Mr. Khatib relies on, is an example of this. Still, regard must be had for the circumstances of each case.

[86] In *Dhillon*, the affiant outlined surveillance observations in the ITO and included damaging and incriminating details that were not in fact included in any of the source materials he was relying on. The Court of Appeal for Ontario found that even if this error was the result of rushing, oversight or confusion, it nonetheless amounted to significant carelessness. While not at the most serious end of the spectrum of state misconduct, it fell on the serious side of that spectrum. *Dhillon*, para 50-51.

[87] The errors and omissions raised by Mr. Khatib in this case are nothing like the affiant's error in *Dhillon*. Cst. Main did not include any mistaken incriminating information in the ITO. The most that can be said is that he left out some information that would have further contextualized the matters he was deposing to.

[88] In addition, it is clear from the *voir dire* evidence that Cst. Main also failed to include several details that would have assisted his case. This was not a situation where he exaggerated or overstated incriminating information while understating information that did not support his case. That too is relevant in assessing where his conduct should be placed on the spectrum of seriousness.

[89] The ITO was not perfect. Cst. Main made some errors and he readily acknowledged them in his testimony. However, in my view, his conduct did not amount to significant carelessness.

[90] It must be remembered that the first factor for consideration under the *Grant* analysis is aimed at determining whether the admission of evidence would bring the admission of justice into disrepute by sending the message that courts, in effect, are condoning breaches of citizens' rights. *Grant*, para 72. The more minor or inadvertent an error, the less likely that the admission of evidence will have that effect on the repute of the administration of justice. On the contrary, excluding evidence because of minor errors on the part of police officers may have the opposite effect and trivialize *Charter* rights.

[91] In my view, the first factor does not favour the exclusion of the evidence.

b) Impact on *Charter*-protected interests

[92] As noted by Nordheimer JA at para 82 of his dissenting opinion in *James*, any time a search by police is ultimately determined to not have been a valid one, it involves a serious impact on the *Charter*-protected interests of the accused. In this case the place searched was Mr. Khatib's dwelling, where the expectation of privacy is extremely high. The impact on Mr. Khatib's rights was serious. This factor favours the exclusion of the evidence.

c) Society's interests in adjudication on the merits

[93] This is often a difficult factor to weigh because it can cut both ways. The more serious the offence, the higher the public interest in having cases decided on the merits. However, the higher the stakes for an accused, the higher the public interest in ensuring that the justice system is above reproach in dealing with the matter.

[94] The charges that Mr. Khatib faces are very serious. He is alleged to have been in possession of cocaine and marihuana for the purposes of trafficking in an isolated northern community.

[95] In addition, the evidence at issue is reliable, compelling evidence. Everyone agrees it is vital to the Crown's case. In my view the third factor favours inclusion.

[96] On the whole, and acknowledging that the evidence was found during the search of a dwelling house, I conclude that even if the search warrant were to be set aside, the evidence should not be excluded.

IV) CONCLUSION

[97] For these Reasons, Mr. Khatib's Application is dismissed.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
15th day of May 2020

Counsel for the Crown: Morgan Fane

Counsel for Talal Khatib: Nicole M. Rodych

S-1-CR-2018-000130

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

HER MAJESTY THE QUEEN

Respondent

-and-

TALAL KHATIB

Applicant

RULING ON APPLICATION TO EXCLUDE EVIDENCE BY THE HONOURABLE JUSTICE L.A. CHARBONNEAU