

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

-v-

**QUINTIN GLASGOW-BROWNLOW and
MAHMOUD TALIANI**

Transcript of the Reasons for Judgment of the Honourable Justice S.H. Smallwood, sitting in Yellowknife, in the Northwest Territories, on the 12th day of June, 2020.

APPEARANCES:

B. Green & J. Major-Hansford:	Counsel for the Crown appearing via teleconference
P. Harte:	Counsel for Quintin Glasgow-Brownlow appearing via teleconference
J. Chadi:	Counsel for the Mahmoud Taliani appearing via teleconference

Charge under s. 5(2) of the *Controlled Drugs and Substances Act*

There is a ban on the publication, broadcast or transmission of any information that could identify the complainant pursuant to s. 486.4 of the *Criminal Code*.

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1 (REASONS FOR DECISION)

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3 **INTRODUCTION**

4 Quintin Glasgow-Brownlow and Mahmoud Taliani are
5 jointly charged with possession of cocaine for the
6 purpose of trafficking contrary to section 5(2) of the
7 *Controlled Drugs and Substances Act*. The charge
8 arises from the execution of a search warrant at a hotel
9 room in the Chateau Nova Hotel in Yellowknife by
10 members of the Royal Canadian Mounted Police on
11 December 1, 2017, where the accused were located
12 along with almost 200 grams of crack cocaine.

13 Both accused have challenged the validity of
14 the search warrant which authorized the search of the
15 hotel room. The notice of motion alleges a breach of
16 the constitutional rights of Glasgow-Brownlow and
17 Taliani guaranteed by sections 8 and 9 of the *Canadian*
18 *Charter of Rights and Freedoms*. They are challenging
19 the validity of the search warrant, arguing that the
20 Information to Obtain (ITO) did not contain sufficient
21 grounds facially and subfacially to permit the issuance
22 of the search warrant. They are seeking the exclusion
23 of the evidence pursuant to section 24(2) of the
24 *Charter*.

25 The Crown's case was presented in the course
26 of a *voir dire* held on February 10 through 12, 2020.

27 There were three witness who testified on the *voir dire*:

1 Constable Bryan Martell, the affiant of the ITO;
2 Constable Kyle MacDonald; and Corporal Jim
3 Strowbridge, two RCMP members who were involved
4 in the surveillance at the Chateau Nova Hotel. A
5 number of exhibits were also entered: a book of
6 exhibits containing the ITO and a BlackBerry
7 Messenger (BBM) chat, an agreed statement of facts,
8 and several photographs.

9

10 **FACTS**

11 The facts from the agreed statement of facts
12 are that on December 1, 2017, at approximately 7 p.m.,
13 members of the RCMP executed a search warrant at
14 Room 114 of the Chateau Nova Hotel in Yellowknife,
15 Northwest Territories. Mahmoud Taliani and Quintin
16 Glasgow-Brownlow were located in the hotel room.

17 In the search of the room, RCMP members
18 found a suitcase at the foot of one of the beds. The
19 suitcase contained a luggage tag bearing the name of
20 Quintin Glasgow-Brownlow and a 128 small baggies of
21 crack cocaine weighing a total of 31 grams and a
22 Sylvania CD player containing 20 baggies. Each of
23 those baggies contained approximately 30 smaller
24 baggies of crack cocaine for a total of 600 baggies.
25 The 600 baggies, in total, weighed 165.2 grams of
26 crack cocaine. The Sylvania CD player could be
27 opened to access the crack cocaine using a

1 screwdriver, which was located in another suitcase.

2 So these facts are not in dispute, and it is not in
3 dispute that, if one or both of the accused were found to
4 be in possession of the crack cocaine located in Room
5 114, that possession would be the purpose of
6 trafficking.

7

8 **INVESTIGATION**

9 As well, the background information which led
10 the officers to the Chateau Nova Hotel on December 1,
11 2017, which is contained in the Information To Obtain in
12 paragraphs 4 through 14 is not really in dispute.

13 Counsel raised some issues with the accuracy of some
14 of the information in the ITO such as with paragraph 12,
15 but the real issue is with the accuracy of paragraphs
16 15(h) and, to an extent, 15(f), and I will address those
17 issues later.

18 First, I will summarize the investigation leading
19 up to the afternoon of December 1, 2017, at the
20 Chateau Nova. The RCMP in Yellowknife were
21 advised on November 30, 2017, by the Saskatoon
22 Police Service that a female, whose identity is
23 protected by a publication ban, and I will refer to her as
24 J.M., that J.M. was currently in Yellowknife and may be
25 the victim of human trafficking.

26 The Saskatoon Police advised that they had
27 been contacted by J.M. who had been brought to

1 Yellowknife to work in the sex trade, and she was with
2 three males who were also in possession of drugs.
3 They were in Room 23 at the Northern Lites Motel.
4 J.M. was scared and wanted help getting away from
5 these men.

6 J.M.'s contact information was provided to the
7 Yellowknife Police who contacted her. J.M. advised
8 that she was at the Northern Lites Motel and had gotten
9 out of the room using a ruse that she was going to get
10 cigarettes and that the three males were still in Room
11 23. J.M. advised that these males had her purse and
12 iPad and a significant amount of cocaine and fentanyl.

13 The RCMP attended the Northern Lites Motel
14 and extracted J.M. Surveillance was conducted at the
15 Northern Lites Motel. At that point, the information
16 about the males was vague. Officers did observe that
17 shortly after J.M. left with Constable Martell, they
18 observed a white male and two black males depart in a
19 City Cab Taxi. The males had several bags, including
20 a black and white Under Armour duffle bag.

21 At that point, the surveillance team believed
22 they were looking for a group of three black males and
23 were not aware that one male suspect was actually a
24 white male. They observed that the taxi went towards
25 Behchoko on the highway. The taxi company later
26 advised that the three passengers had been dropped
27 off in Behchoko.

1 J.M. provided a statement to Constable Martell.
2 She advised that a male by the name of Jonathan Sosa
3 had brought her to Yellowknife to work as an escort and
4 that he controlled and was involved in trafficking her
5 sexual services. J.M. described Sosa and the two
6 other males who she said were in possession of
7 cocaine, crack cocaine, and fentanyl, and planned to
8 sell the drugs.

9 J.M. described how she and the others had
10 driven to Yellowknife. She advised that they had been
11 in a vehicle accident with a bison during the trip. J.M.
12 produced a baggie of cocaine during the interview,
13 claiming that she had been given a bag of drugs by the
14 men to hide following the accident in case the police
15 came. She later took a 1 oz. baggie of the cocaine
16 from the bag and hid it on her person.

17 The Fort Providence RCMP had responded to
18 a single-vehicle collision with a bison in the early
19 morning hours of November 30, 2017, near Fort
20 Providence. The registered owner of the vehicle was
21 determined to be Mohamed Mohamud Ali. Also located
22 in the vehicle were two business cards for police
23 officers with the Saskatoon Police Service.

24 J.M. described the three males to the police.
25 She described Jonathan Sosa, who she called John, a
26 black male named Chip, and another black male whose
27 name did not know. J.M. also explained that there was

1 a second vehicle, a Jeep Compass with Saskatchewan
2 licence plate 647 KQY, en route to Yellowknife,
3 believed to have more drugs brought by two black
4 males, one of whom was the boyfriend of the Jeep's
5 owner.

6 At 9 p.m., on November 30, 2017, City Cab's
7 dispatch contacted the RCMP to report one of their
8 drivers had picked up several males at the Northern
9 Lites Motel at approximately 1 p.m. and driven them to
10 Behchoko. The males had left a bag in the taxi which
11 had been recovered and contained a large bag of white
12 powder. The RCMP attended and seized this bag
13 which was a large purse and contained items that J.M.
14 had said were in her purse. The purse did not contain
15 J.M.'s iPad which she had said had been in there and
16 also contained personal information and other
17 important documents.

18 Subsequent investigation revealed Jonathan
19 Sosa to be Jonathan Oullett-Gendron. A driver's
20 licence photograph was located for Jonathan Oullett-
21 Gendron, and Constable Kyle MacDonald confirmed
22 during surveillance that it was the same male.

23 On December 1, 2017, Corporal Strowbridge
24 received a called from the Chateau Nova Hotel,
25 advising that Mohamed Ali had just checked in. The
26 officer had contacted the hotel the night before to see if
27 the suspect males had checked in. Based on that

1 information, surveillance was established at the
2 Chateau Nova Hotel. A number of officers participated
3 in the surveillance, and some of the communication
4 between the officers was conducted through a
5 BlackBerry Messenger chat.

6 Constable Kyle MacDonald was located inside
7 the hotel and later took a position inside a hotel room
8 opposite Room 113. Corporal Jim Strowbridge was
9 located outside the hotel. Constable Doug Melville was
10 also outside the hotel.

11 Sergeant Riou participated in the BBM chat, but
12 was not present during the surveillance. Constable
13 Martell also participated in the BBM chat but was not
14 present at the hotel. He was preparing the ITO and
15 communicated with the surveillance members to gather
16 their observations for the ITO.

17 The surveillance observed the three males
18 going into Room 113, and hotel staff confirmed that
19 Mohamed Ali had checked into Room 113.

20 Constable MacDonald obtained a photograph
21 of one of the black males which was shown to J.M.
22 before she departed Yellowknife on a flight, and she
23 confirmed that it was Chip. This was Mohamed Ali, the
24 registered owner of the vehicle that had been in the
25 collision with the bison. She also confirmed that Chip
26 was wearing the same clothes that she had seen him
27 in.

1 The second black male was observed by the
2 surveillance team and was noted to be wearing a
3 camouflage jacket. J.M. had previously described this
4 male in her statement. She had stated that she did not
5 know his name and described him as tall, a black
6 Haitian or Jamaican or something like that, that he had
7 a nice smile, all white teeth, that he was sporty, always
8 wearing grey Jordan-type clothes and no jacket. At the
9 airport, Constable Martell asked J.M. about what the
10 black male wore, and she said a camouflage jacket.

11 Constable MacDonald also observed Jonathan
12 Oullett-Gendron, a.k.a. Sosa, with the other two black
13 males. The officers observed Jonathan Oullett-
14 Gendron (Sosa), Mohamed Ali (Chip), and the third
15 black male, the unknown black male wearing a
16 camouflage jacket, enter Room 113.

17 I do not think either of the applicants disputes
18 that the RCMP had reasonable grounds to obtain a
19 search warrant for Room 113; that is not the issue here.
20 It is the connection to Room 114 where the applicants
21 and the crack cocaine were located, and whether there
22 were reasonable grounds to obtain the search warrant
23 for Room 114 that is in issue. None of the observations
24 that I have detailed so far involve the applicants or
25 Room 114.

26 The relevant observations from the BBM chat
27 are: The first observation is at 2:33 p.m. when Corporal

1 Strowbridge sees two guys in camo jackets. They go
2 into the hotel. At that point, the officers are unclear if
3 they are related to their suspects.

4 At 3:18 p.m., Constable MacDonald texted:
5 So not a crazy wrench but camo guy who we
6 ID as UM3 and the new camo guy driving the
7 Alberta rental were in the lobby together earlier
8 and the rental guy asked the lady at the front
9 desk for a second key to his room and gave it
10 to UM3. I thought he said Room 141 but I am
11 not sure if that room exists.

12 Potentially, the rental guy was the actual
13 courier and has his own room.

14 The officers determined that there was no
15 Room 141 at the hotel. Corporal Strowbridge inquired
16 with hotel staff and was advised that a white guy in a
17 camo jacket came and asked to reprogram a key for
18 Room 114.

19 At this point, when Room 114 comes up,
20 Constable Martell was in the process of finishing the
21 ITO. The officers then had a discussion about whether
22 they could confirm that their suspects were in Room
23 114 as well. They were advised that Mahmoud Taliani
24 was the renter of Room 114, and that he had checked
25 in around 3 a.m. that morning.

26 Constable MacDonald's conclusion at 3:37
27 p.m. was:

1 I think it's weak. Our only connection is [J.M.]
2 said one guy had a camo coat and I saw two
3 guys with camo coats meet in the lobby and
4 one guy got another key to 114 for the second
5 camo guy. We have also not seen a camo guy
6 go to 113.

7 At 3:42, Constable MacDonald texted, "Three
8 going out for smokes." Then at 3:43, he texted, "Sosa,
9 Chip, and an unknown in could be the three guy." At
10 3:43, he texted, "Out the end door."

11 At 3:44, Sergeant Riou texted, "kmac (who is
12 Constable MacDonald) are you able to lock down if any
13 of them return to 114?"

14 Then, Corporal Strowbridge texted, also at
15 3:44, "Males returning."

16 At 3:45, Constable MacDonald texted, "kk I just
17 heard a door to my right close and then all three guys
18 who came out of 113 appeared. 114 is to my right."

19 Corporal Strowbridge and Sergeant Riou then
20 text, and they view the rooms as being associated.
21 Constable MacDonald then pointed out that it was two
22 doors down to the right, and he asked if they could
23 confirm who was in Room 112.

24 Corporal Martell then texted at 3:46, "I have yet
25 to really hear what can get is into 114."

26 Sergeant Riou, who is not there, responded at
27 3:46 p.m., "kmac heard the door open and our targets

1 appeared. Did not come out of 113, and the registered
2 guests in 114 has a history of drug trafficking in Fort
3 Mac.” Sergeant Riou then texted at 3:48, “Not uber-
4 solid, but would slide through.”

5 The officers continue to text until Constable
6 MacDonald texted at 3:57 p.m. that he would call
7 Constable Martell.

8 So this is the relevant evidence from the BBM
9 chat.

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THE LEGAL FRAMEWORK

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The parties appear to agree on the legal framework applicable to the analysis of the search warrant. Section 8 of the *Charter* guarantees that everyone has the right to be secure against unreasonable search or seizure. Section 9 of the *Charter* guarantees everyone the right not to be arbitrarily detained or imprisoned.

Section 487 of the *Criminal Code* authorizes the issuance of a search warrant where a justice is satisfied by information on oath that there are reasonable grounds to believe that certain items would be found at the locations specified in the search warrant. Reasonable grounds to believe is a standard of credibly-based probability. The ITO must establish reasonable grounds to believe that an offence has been committed and that there is evidence to be found

1 at the place of the proposed search.

2 The constitutionality of a search can be
3 challenged by demonstrating that the ITO which was
4 relied upon to obtain the search warrant could not
5 justify its issuance. If the challenge is successful, the
6 search is considered warrantless and is a *prima facie*
7 unreasonable search.

8 In reviewing a search warrant, the reviewing
9 judge does not make a *de novo* assessment of the ITO
10 but rather decides whether there is sufficient credible
11 and reliable evidence to permit a justice to find
12 reasonable and probable grounds to believe that an
13 offence has been committed and that evidence of the
14 offence would be found at the place specified in the
15 warrant. *R. v. Morelli*, 2010 SCC 8 at paragraph 40.

16 As stated in *R. v. Phan*, 2017 ONSC 978 at
17 paragraph 25, citing *World Bank Group v. Wallace*,
18 2016 SCC 15 at paragraph 20:

19 As a general rule, there are two ways to
20 challenge a wiretap authorization: first, that the
21 record before the authorizing judge was
22 insufficient to make out the statutory
23 preconditions; second, that the record did not
24 accurately reflect what the affiant knew or
25 ought to have known, and that if it had, the
26 authorization could not have issued.

27 The first method is referred to as a facial

1 challenge, and the second method is referred to as a
2 sub-facial challenge. The same principles are
3 applicable to a challenge of a search warrant. In this
4 case, the applicants are challenging the search warrant
5 in both ways: facially and subfacially.

6 A challenge to the facial validity of a search
7 warrant requires the reviewing the judge to examine the
8 ITO and to determine whether, on the face of the
9 information disclosed there, the justice could have
10 issued the warrant. The record which is examined on a
11 facial review is fixed. It is looking at the ITO and not an
12 amplified record. *R. v. Sadikov*, 2014 ONCA 72 at
13 paragraph 37.

14 A sub-facial challenge goes behind the ITO to
15 examine the reliability of the content of the ITO. A sub-
16 facial challenge involves an amplified record but does
17 not expand the scope of review to permit the reviewing
18 judge to substitute their view for that of the authorizing
19 justice of the peace. The task of a reviewing judge is to
20 consider whether on the record before the justice of the
21 peace as amplified on the review, the justice of the
22 peace could have issued the warrant. *Sadikov*,
23 paragraph 38.

24 The issue is not whether the allegations
25 forming the basis of the ITO are true, but whether the
26 affiant had a reasonable belief in the existence of the
27 required statutory grounds. A sub-facial challenge

1 hinges on what the affiant knew or ought to have
2 known at the time the affidavit was sworn, and the
3 accuracy of the affidavit is tested against the affiant's
4 reasonable belief at that time. *Phan*, paragraph 25,
5 citing *World Bank Group* at paragraphs 119, 121.

6 A reviewing court must exclude erroneous
7 information included in the original ITO, but may also
8 consider, to an extent, additional evidence adduced on
9 the *voir dire* to correct minor errors in the ITO.
10 Amplification evidence can correct good faith errors of
11 the affiant in preparing the ITO but does not extend to
12 deliberate attempts to mislead the authorizing judge.
13 *Sadikov*, paragraph 85.

14 If it is established that the affiant knew or
15 should have known that evidence was false, inaccurate
16 or misleading, that evidence should be excised. If the
17 affiant could not have reasonably known of the error or
18 omission, it is not relevant. An affiant must also not
19 ignore signs that other officers may be misleading them
20 or omitting material information. However, if there is no
21 indication that anything is amiss, they do not need to
22 conduct their own investigation. *World Bank Group*, at
23 paragraphs 121 to 123, cited in *Phan* at paragraph 25.

24 As stated in *Sadikov* at paragraph 88:

25 The inquiry begins and ends with an
26 assessment of whether the amplified record
27 contains reliable evidence that might

1 reasonably be believed on the basis of which
2 the warrant could have issued.

3 In considering a challenge to a search warrant,
4 the Court must consider the totality of the
5 circumstances set out in the ITO. Also, it is important to
6 keep in mind that a standard of perfection is not
7 required. The ITO must be read as a whole in a
8 common sense manner, having regard to its author.
9 The ultimate question is whether there are reasonable
10 and probable grounds to believe that an offence has
11 been committed and that evidence will be found at the
12 location specified in the warrant. *R. v. Green*, 2015
13 ONCA 579 at paragraph 18.

14

15 **ANALYSIS**

16 The cross-examination of the affiant Constable
17 Martell and of Constable MacDonald and a review of
18 the information relied upon by the affiant has
19 demonstrated that there were inaccuracies and
20 informational gaps in what was included in the ITO.
21 There was also a failure to follow-up on some
22 information. The link to Room 114 was tenuous, and
23 that was something that the affiant and other officers
24 acknowledged that they were aware of. It is also
25 apparent from the BBM chat. Paragraphs 15(f) and (h)
26 of the ITO contain the only evidence which really
27 establishes grounds to search Room 114 and those

1 paragraphs are, at best, inaccurate.

2 Starting with paragraph 12 of the ITO, as that
3 was also raised in argument, that paragraph deals with
4 the traffic stop of the Jeep Compass, and states:

5 At approximately 17:30 hours on November
6 30th, 2017, based on the information provided
7 by [J.M.], members of FIU conducted a vehicle
8 stop of a Jeep Compass with Saskatchewan
9 plate 647 KQY, which I queried and learned is
10 registered to Keisha Morris. Mohamed Abdulla
11 Ali and Mohamed Yusef were in the vehicle
12 and were arrested. No illicit drugs were located
13 in the vehicle, but items belonging to Morris
14 that had been retrieved from the crash site
15 were in the vehicle. Ali lied about his identity
16 and remains in custody for obstruction and
17 several breach charges. I believe the
18 occupants of this vehicle were quite possibly
19 warned by the other three males that [J.M.] had
20 disappeared and was possibly with the police.

21 It is acknowledged that part of the paragraph is
22 inaccurate. The items located in the vehicle belonged
23 to J.M. and not Morris, the registered owner. This is a
24 simple mistake. Constable Martell acknowledged it
25 was inaccurate and explained that he was in a rush
26 while completing the ITO and made that mistake. In
27 my view, this is not a significant error. It is minor and

1 can simply be corrected.

2 The other complaint raised with this paragraph
3 is the final line which Mr. Harte argued is pure
4 conjecture and which is a cover-up for what he argues
5 is the unreliability of J.M.'s evidence, that her evidence
6 was not proven by the seizure of the Jeep Compass.
7 No drugs were located during the vehicle stop.

8 I do not see any issue with this line. It is the
9 belief of the affiant, and it is stated in the paragraph that
10 it is his belief. The evidence of J.M. had been
11 corroborated in other respects, and the idea that J.M.'s
12 evidence was generally not reliable is not supported by
13 the evidence. This paragraph was necessary in the
14 interests of full, fair, and frank disclosure, and I do not
15 see that that specific line or conclusion would have had
16 a significant impact on the decision to issue the
17 warrant. There was sufficient evidence to grant the
18 warrant on the basis of the other evidence contained
19 within the ITO.

20 Turning now to paragraph 15, the two portions
21 of paragraph 15 of the ITO that the applicants take
22 issue with are:

23 15. Based on that information, FIU established
24 surveillance at the Chateau Nova Hotel at 4571
25 48th Street, Yellowknife. I listened to the radio
26 coverage of that surveillance and learned the
27 following:

1 (f) Constable MacDonald observed the
2 male in the camouflage jacket
3 requesting a second key for another
4 unknown male, and it was determined
5 that the key was for Unit 114. All of
6 these males were observed together
7 with Oullett-Gendron and Ali in the
8 lobby;

9 (h) Constable MacDonald later observed
10 Oullett-Gendron, Ali, and the third
11 unknown male leave Unit 113 and knock
12 on the door of 114, where they remained
13 for a few minutes. Oullett-Gendron, Ali,
14 and the third unknown male then
15 departed together and returned to Unit
16 113.

17 Paragraph 15(f) of the ITO has Constable
18 MacDonald observing the male in the camouflage
19 jacket requesting a second key for another unknown
20 male, and it was determined that the key was for Unit
21 114. All of these males were observed together with
22 Oullett-Gendron and Ali in the lobby.

23 The evidence does establish that Sosa, Chip,
24 and the unknown black male camo guy were in the
25 lobby together, and that the two camo guys were in the
26 lobby together, but it is not clear to me on the evidence
27 that all of these males: the two camo guys, Oullett-

1 Gendron (Sosa), and Ali (Chip), were all observed
2 together in the lobby, and if so, when and by who. So
3 that is confusing, and I think it is fair to say that it was a
4 confusing situation.

5 Also, the evidence of Constable MacDonald
6 was that there were two guys in camo jackets that he
7 saw that day: the unknown black male wearing a camo
8 jacket that was associated with Sosa and Chip and the
9 new camo guy who was observed in a white Expedition
10 with Alberta rental plates. The two camo-jacket males
11 were observed together. Constable MacDonald
12 observed two guys in camo jackets approach the front
13 desk and the rental camo guy, as he called him, asked
14 for a second key to his room, which he gave to the
15 unknown black male camo guy.

16 This paragraph, as drafted in the ITO, is not
17 accurate. Constable MacDonald's observation is that
18 the rental camo guy obtained the key and then gave it
19 to the unknown black male camo guy who was
20 associated with Sosa and Chip. The paragraph
21 appears to have it reversed, having the black male
22 camo guy obtaining a key and giving it to the rental
23 camo guy.

24 Constable MacDonald thought he heard the
25 male say Room 141. It was determined that there was
26 no Room 141 at the hotel. Inquiries with the hotel
27 revealed that a white guy in a camo jacket came and

1 asked for a key to Room 114.

2 It is not clear from the evidence that the rental-
3 camo-jacket guy was a white male. The paragraph
4 does not include this information but simply states that
5 it was determined that the key was for Unit 114.
6 Constable Martell should have known that the
7 information in paragraph 15(f) was inaccurate and not
8 complete. He had this information available to him at
9 the time he drafted the ITO.

10 Paragraph 15(h) of the ITO has Constable
11 MacDonald observing Oullett-Gendron, Ali, and the
12 third unknown male leave Unit 113 and knock on the
13 door of 114, where they remained for a few minutes.
14 Oullett-Gendron, Ali, and third unknown male then
15 departed together and returned to Unit 113. This
16 paragraph is much more problematic as it is clear from
17 the evidence that it is inaccurate and misleading.

18 It was apparent that this was a chaotic
19 situation. The surveillance team was making
20 observations of the three suspects: Sosa, Chip, and the
21 black male in the camouflage jacket, that had been
22 associated to Room 113 when additional individuals
23 and the prospect of another room came up. There was
24 now another person wearing a camouflage jacket.

25 It was apparent from the BBM chat that there
26 was confusion and that it was an evolving situation.
27 There are approximately 90 messages between 3:18

1 p.m. when Constable MacDonald first mentioned the
2 possibility of a second room through to 3:57 p.m. when
3 Constable MacDonald messaged that he would call
4 Constable Martell.

5 Considering the evidence of Constable Martell
6 and Constable MacDonald, it is apparent that there is a
7 serious inconsistency. It is not possible that both
8 officers are accurate in their recollection of the
9 telephone conversation they had that day.

10 Starting with the evidence of Constable Martell,
11 he was the affiant, and his description of Constable
12 MacDonald's observations in the ITO were that
13 Constable MacDonald observed the three males:
14 Sosa, Chip, and the unknown black male in the camo
15 jacket, leave Unit 113 and knock on the door of 114
16 where they remained for a few minutes. The three
17 males then departed together and returned to Unit 113.
18 The evidence established that this did not happen.

19 Constable Martell testified as follows:

20
21 Q: Essentially, the explanation that you
22 received from him in relation to Room 114,
23 specifically after the trio exited 113, went
24 outside for a couple of minutes, and then
25 return, was that he told you that — 'he'
26 meaning Kyle — told you that he believed that
27 the males went to Room 114.

1 A: Yes.

2 Q: Correct?

3 A: Yeah.

4 Q: And I take it the reason he came to that
5 conclusion, it's your understanding, I put it to
6 you, is because he heard a door to his right
7 close?

8 A: Yeah. He told me on the phone he heard a
9 knock and then the door closed shortly after,
10 and the three of them showed up right then and
11 went into 113.

12
13 Constable Martell was asked in cross-
14 examination about an e-mail that he sent in December
15 of 2018 to the Crown where this issue was addressed:

16
17 Q: All right. And specifically, you say at the
18 last paragraph of your e-mail -- second-last,
19 you say -- I apologize, the third-last paragraph:
20 Kyle told me at one point Kyle observed
21 Oullett-Gendron, Mr. Ali, and the third
22 male leave, and he believed they
23 knocked at 114. A few minutes later, he
24 heard what he believed to be the door of
25 114 open, and the same three went
26 back to Unit 113. Kyle told me he
27 believed they had gone into Unit 114

1 and then returned to 113.

2 That's what you wrote.

3 A: Yeah.

4

5 When Constable Martell was cross-examined
6 about whether this made sense to him, the sequence of
7 events, he stated:

8 I clarified with him on the phone what -- what
9 he saw and heard. So he said they had gone
10 out of 113 and down the hall, and then he told
11 me that he heard a knock at 114, so this is after
12 they're coming back, and that could be
13 misstated in that e-mail, but it was after they
14 came back he heard the noises at 114, and
15 then immediately they went into 113, was my
16 understanding in the phone call with him.

17 Constable Martell agreed in cross-examination
18 that pertinent details were left out of the ITO and that, if
19 he had more time, he would have included those
20 details. He testified that what he wrote was what
21 Constable MacDonald saw; it was just not every detail.
22 Constable Martell later testified:

23

24 Q: But that's what he told you in the phone
25 call.

26 A: He told -- so the sequence of events is what
27 you're saying, that they left 113, that they went

1 down the hall, that they went out for a smoke,
2 Jim sees them come back in. When I talked to
3 Kyle, I said, 'What happened with 114?' And
4 he said, 'I heard a noise at the door or a knock
5 at the door and then they -- the door closed,
6 and they were there, and they went in 113.'
7 That was what mattered to me because at that
8 point still I'm not certain of the grounds, and I
9 need to know if this room is connected to the
10 people we were investigating. That was Kyle
11 telling me that it was, and that was -- that's
12 what was important to me, not if they went out
13 for a smoke.

14
15 Later, again in cross-examination, Constable
16 Martell testified:

17
18 Q: Okay. So when you called him, he told you
19 they left 113 and knocked on the door of 114?
20 A: No. He said the whole sequence of that
21 they had gone, went out for a smoke, and on
22 the way back they went to 114, or he heard.
23 He couldn't see this. Again, he's looking
24 through a peephole and can only see 113. He
25 says he heard a knock at the door to his right,
26 and then the door opened, closed. They were
27 there, and they went in 113. So I said, 'Did

1 they come from 114 and go to 113?' And he
2 said, 'I -- I believe they did.' So there was a
3 whole -- as we've gone through, there was a
4 whole sequence of down the hall, out for a
5 smoke, and then back. But before coming
6 back into 113, Kyle believed they went to 114.

7 Q: And remained there for a few minutes?

8 A: This is the phone conversation we had.

9

10 Constable Martell acknowledged that he would
11 have liked to have questioned more things, but he did
12 not have the time. He acknowledged that he never
13 asked Constable MacDonald about this few minutes of
14 being inside 114, that he never questioned whether it
15 was possible based on the timeline in the BBM chat,
16 and that he did not question Constable MacDonald
17 about how sure he was that it was Room 114 that the
18 three males had gone into.

19 Constable MacDonald's observations were the
20 main observations that implicated Room 114 in the
21 surveillance. Corporal Strowbridge evidence supported
22 some of Constable MacDonald's observations, but
23 Corporal Strowbridge was located outside and did not
24 see any activity specifically associated with Room 114.

25 Constable MacDonald's text message at 3:45
26 on the BBM chat was: "kk I just heard a door to my
27 right close, and then all three guys who came out of

1 113 appeared. 114 is to my right.”

2 In cross-examination, Constable MacDonald
3 testified that he was not sure if he heard the door open
4 or close but thought it was probably both. When asked
5 about the phone conversation with Constable Martell,
6 Constable MacDonald testified as follows:

7

8 Q: What did you talk about?

9 A: I don't recall the exact context of the
10 conversation. I think it was confirmation of
11 what was going on. I'm assuming he had some
12 questions about what he was hearing and stuff.
13 I'm assuming I would have confirmed to the
14 best of my abilities what it was that I was
15 seeing, hearing, but I don't recall the exact
16 conversation.

17 Q: You wouldn't lie to him, would you?

18 A: No.

19 Q: You wouldn't exaggerate things to him,
20 would you?

21 A: No.

22 Q: I wouldn't think so. Did you tell him that
23 when the three males left 113, they went to 114
24 and knocked on the door? Did you tell him
25 that?

26 A: No.

27 Q: I didn't think so. Let me just expand on that.

1 Did you tell him that when the three males
2 exited 113, they went to 114 and remained
3 inside 114 for a few minutes? Did you tell him
4 that? Yes or no.

5 A: No.

6
7 Later in cross-examination, Constable
8 MacDonald testified that 112 and 114 were to his right.
9 He was also asked about the side emergency exit door
10 and stated today that he thought that that was probably
11 the door that he heard open, and that door was also to
12 Constable MacDonald's right.

13 Constable MacDonald testified that he did not
14 observe the three males knock on the door of Room
15 114:

16
17 Q: You didn't observe Oullett-Gendron, Ali,
18 and a third unknown male knock on the door of
19 114?

20 A: No, I didn't see that.

21 Q: You didn't see them, or you didn't see them
22 remain there for a few minutes?

23 A: No, I didn't. I didn't see them at the door of
24 Room 114 at any point in time.

25 Q: And in fact, you don't know that they
26 remained in the room at all.

27 A: That's correct. I -- I don't know that.

1

2

Constable MacDonald was asked about his
supplementary occurrence report which was created
shortly after the surveillance. So:

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5

6

Q: 'Constable MacDonald watched
them walk about 10 feet before leaving
his viewpoint, and he heard a door open
and close to his right. Constable
MacDonald felt that the door that had
opened was the door of Room 114.
About one minute later, Constable
MacDonald heard this door open and
close again and he observed the same
three males returning to 113. Constable
MacDonald related this information to
Constable Strowbridge who advised that
there was no occupants in 112, and the
closest occupied room to Constable
MacDonald's location was Room 114.'

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That's your note?

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A: Correct.

23

Q: All right. So I take it, it appears to you when
you're -- when things are fresh in your mind
and you're creating this continuation report that
it appeared that there was about a minute
between the time you heard the door open and

24

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1 close on 114 and you heard the door open and
2 close again in Room 114?

3 A: Yeah, give or take. I would say that's fair.

4

5 There are several problems with paragraph
6 15(h) of the ITO. It is inaccurate because it does not
7 include all of the details of what we do know occurred.
8 The three males were observed leaving Room 113 and
9 going down the hallway by Constable MacDonald.
10 Constable MacDonald texted that they were out the
11 end door. It is not clear whether Constable MacDonald
12 observed this or surmised this, and his evidence on the
13 *voir dire* was somewhat confusing, but the end result
14 that I concluded was that he does not recall now which
15 it was.

16 The three males were observed by Corporal
17 Strowbridge outside, and a minute later, Corporal
18 Strowbridge texted, "Males returning." Following this is
19 when Constable MacDonald apparently made his
20 observation about the door to his right. But the ITO, as
21 drafted, has the males going directly from Room 113 to
22 Room 114.

23 Given what we know about the possibility that
24 Constable MacDonald was mistaken about anyone
25 going to or coming from Room 114, this is a significant
26 discrepancy. It implies a direct link between Room 113
27 and Room 114 that just does not exist on the evidence.

1 I find that this portion of the ITO is misleading.

2 Constable Martell testified that Constable
3 MacDonald told him that he heard a noise or a knock at
4 the door, the door opened and closed, and then the
5 three returned to Room 113. Constable Martell also
6 testified that Constable MacDonald said he believed
7 they came from Room 114 and were in the room for a
8 few minutes. Constable MacDonald did not recall the
9 specific details of this conversation, and apparently
10 does not recall the exact context of the conversation,
11 but denied that he told Constable Martell that the three
12 knocked on the door of Room 114 or that they were
13 inside Room 114 for a few minutes.

14 Constable Martell, as the affiant, had concerns
15 about whether there was sufficient grounds to include
16 Room 114 in the search warrant, that is clear from the
17 BBM chat. When Sergeant Riou asks him to write in
18 both Rooms 113 and 114 on the ITO, Constable
19 Martell's response is, "I have yet to hear what can really
20 get us in to Room 114." It is only after the telephone
21 conversation with Constable MacDonald that Constable
22 Martell is satisfied that there are sufficient grounds to
23 include Room 114 in the ITO. It is also only after the
24 telephone conversation between the two that the
25 additional details emerge regarding the knock on the
26 door of Room 114, and also, the three males being in
27 the room for a few minutes.

1 Constable MacDonald denied that he told
2 Constable Martell about a knock or the males being in
3 Room 114 for a few minutes. However, Constable
4 MacDonald's supplementary occurrence report implies
5 that the three males were in Room 114 for a minute.
6 Now, one minute is not a few minutes, and the
7 occurrence report also does not reference a knock.

8 Constable MacDonald's occurrence report also
9 raises the possibility that the males went to Room 114
10 twice, which was not his evidence generally on the *voir*
11 *dire* other than at the end of his cross-examination
12 when he was asked about this in the occurrence report,
13 and he confirmed that there was about a minute
14 between hearing the door open and close to 114 and
15 then hearing it again. Overall, I found Constable
16 MacDonald's evidence about this confusing. I am not
17 certain that he actually remembers his observations
18 from that date.

19 Counsel for the applicants have made
20 submissions about Constable Martell and Constable
21 MacDonald and their credibility and who might be the
22 officer who is not being truthful. And to be fair
23 applicants' counsel, I have not completely stated their
24 arguments in this respect, and I do not intend to. It is a
25 challenge to summarize their arguments about which
26 police officer may not have been truthful without
27 essentially repeating them, which I do not intend to do

1 in this decision. I have considered their arguments,
2 and I have considered the evidence of Constable
3 Martell and Constable MacDonald closely. I do not
4 know that I have to come to a firm conclusion about
5 which officer has accurately testified as to the contents
6 of the telephone conversation between them.

7 If Constable MacDonald told Constable Martell
8 the information that Constable Martell claims he was
9 told, this should have raised other questions with
10 Constable Martell. The BBM chat timeline makes it
11 clear that it was not possible for the three males to be in
12 Room 114 for a few minutes, a few seconds possibly,
13 but a few minutes would have to be an exaggeration. I
14 recognize that the situation was chaotic and confusing,
15 and that Constable Martell was not there and was
16 relying on the observations of the other officers which
17 were relayed to him through the BBM chat.

18 The BBM chat and his conversation with
19 Constable MacDonald were Constable Martell's source
20 of information for paragraph 15(h) of the ITO.
21 Constable Martell may not have been paying attention
22 to the timestamps on the BBM chat. But if he was
23 monitoring the BBM chat, as it was apparent that he
24 was as he was responding and providing information to
25 the other officers during this time period, then it should
26 have been apparent to him that there were issues with
27 the timeline of events that needed to be clarified.

1 The conversation with Constable MacDonald
2 and the addition of details of the knock and of being in
3 Room 114 for a period of time, whether it was a minute
4 or a few minutes, should have generated more
5 questions. Even if Constable Martell was being
6 mislead by Constable MacDonald, he should have
7 realized that something was amiss with the sequence
8 of events and sought clarification.

9 While Constable Martell testified that he did not
10 have the time to ask more questions, those additional
11 steps would not have been time consuming. He had
12 Constable MacDonald on the telephone. He could
13 have asked additional questions. He could have taken
14 a few minutes and reviewed the BBM chat and the
15 information that he had been provided by Constable
16 MacDonald and called Constable MacDonald back to
17 seek clarification. He could have reviewed his draft of
18 paragraph 15 with Constable MacDonald to determine
19 if it was accurate. None of this would have been
20 exceptionally time consuming.

21 I am conscious of not requiring a standard of
22 perfection of the police in completing an ITO, that is not
23 required. And it is not required that all of the
24 information in an ITO be determined to be ultimately
25 true. It is an investigation. It is an ongoing process.
26 And I recognize that this is an unusual situation. But in
27 this case, the link with Room 114 was questionable and

1 required scrutiny to determine if it had been
2 established. The information that had been provided to
3 Constable Martell should have caused him to ask
4 questions to clarify the sequence of events and the
5 observations of Constable MacDonald. In addition,
6 what was ultimately included in paragraph 15(h) was
7 not accurate based on the information that Constable
8 Martell was aware of.

9 Ultimately, I am satisfied that paragraph 15(h)
10 should be excised from the ITO.

11 With respect to paragraph 15(f), even if it were
12 amplified, as the Crown suggests, to correct the
13 inaccurate information and include the additional
14 information, I am not satisfied on the record before the
15 justice of the peace, as amplified on the review, that the
16 justice of the peace could have issued the warrant.
17 The only reference in the ITO to Room 114 was the
18 driver of the Expedition getting a room key for Room
19 114 and providing it to the unknown black male. It
20 established a link to Room 114, but I cannot conclude
21 that it established reasonable grounds to believe that
22 evidence would be found in Room 114, without more.

23 None of the police officers believed at the time
24 that this was sufficient to establish grounds to include
25 Room 114 in the search warrant, and I agree with their
26 assessment.

27 Therefore, I conclude that the search warrant

1 could not have been issued on an assessment of the
2 sub-facial validity. Given this conclusion, I have not
3 addressed the arguments on facial validity. And while I
4 have not addressed every argument raised in the
5 applicants' written submissions, I have considered
6 them.

7

8 **SECTION 24(2) ANALYSIS**

9 Having concluded that the search warrant could
10 not have been issued, the search was, therefore, *prima*
11 *facie* unreasonable. I do not understand that the Crown
12 is seeking to justify the search but is instead seeking
13 the admission of the evidence pursuant to section 24(2)
14 of the *Charter*.

15 Having found breaches of the accused's
16 *Charter* rights, the issue becomes whether the
17 evidence should be excluded.

18 Section 24(2) of the *Canadian Charter of Rights*
19 *and Freedoms* states:

20 Where, in proceedings under subsection (1), a
21 court concludes that evidence was obtained in
22 a manner that infringed or denied any rights or
23 freedoms guaranteed by this *Charter*, the
24 evidence shall be excluded if it is established
25 that, having regard to all of the circumstances,
26 the admission of it in the proceedings would
27 bring the administration of justice into disrepute.

1 The Supreme Court of Canada in *R. v. Grant*
2 established what must be considered in determining
3 whether evidence obtained in breach of an accused's
4 *Charter* rights should be excluded. A court must
5 assess and balance the effect of admitting the evidence
6 on society's confidence in the justice system, having
7 regard to three factors: 1) the seriousness of the
8 *Charter* infringing state conduct; 2) the impact of the
9 breach on *Charter* protected interests of the accused;
10 and 3) society's interest in the adjudication of the case
11 on its merits.

12

13 **THE SERIOUSNESS OF THE BREACH**

14 The Court has to assess the seriousness of the
15 conduct that led to the breach. There is a difference
16 between the admission of evidence obtained through
17 inadvertent or minor violations of the *Charter* and
18 evidence obtained through a willful or reckless
19 disregard of *Charter* rights. The admission of evidence
20 obtained through a willful or reckless disregard of
21 *Charter* rights will have a negative effect on public
22 confidence in the justice system and risk bringing the
23 administration of justice into disrepute. *Grant* at
24 paragraph 74.

25 Whether the police were operating in good
26 faith is another consideration in assessing the
27 seriousness of the police conduct. However, the Court

1 in *Grant* also noted that ignorance of *Charter* standards
2 must not be encouraged, and negligence or willful
3 blindness does not constitute good faith.

4 In *R. v. Paterson*, 2017 SCC 15, the Supreme
5 Court of Canada stated that for errors to be considered
6 to have been made in good faith, they must be
7 reasonable. With respect to search warrants, truthful
8 disclosure in an ITO is the standard, and the police do
9 not get credit for doing what is expected of them. *R. v.*
10 *Szilagyi*, 2018 ONCA 695 at paragraph 59.

11 In this case, the information that was included
12 in the ITO that provided the grounds to search Room
13 114 was inaccurate and misleading. The affiant
14 acknowledged some of the information was inaccurate
15 and testified that the situation was confusing and that
16 he was under time constraints. There is no evidence of
17 systemic or institutional abuse which would aggravate
18 the seriousness of the breaches, but there is the issue
19 of the conversation between Constable MacDonald and
20 Constable Martell and the significant discrepancy in
21 their recollections of this conversation, and this is
22 troubling.

23 I cannot conclude that there was good faith in
24 this situation as contemplated in *Grant*, and I conclude
25 that the *Charter* breaching conduct can be considered
26 serious and tends to support the exclusion of the
27 evidence.

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THE IMPACT ON THE ACCUSED’S INTERESTS

The Court must also evaluate the extent to which the breach undermined the *Charter* protected interests of the accused. The impact of a *Charter* breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused’s interest, the greater the risk that the admission of the evidence will bring the administration of justice into disrepute. *Grant* at paragraph 76.

An unreasonable search that intrudes on an area in which an individual enjoys a high expectation of privacy or that demeans their dignity is more serious than one that does not. *Grant* at paragraph 78.

In considering physical evidence, the issue of privacy is the principal interest to consider. An individual has a higher expectation of privacy in a place like a dwelling house rather than a place of business or a vehicle where there is a lesser expectation of privacy. *Grant* at paragraph 113.

In this case, the applicants were in a hotel room in which they have a higher expectation of privacy. The RCMP did obtain a warrant, so this is not a search where there was not an attempt to obtain a warrant. However, the grounds establishing a link to Room 114 were tenuous.

Overall, I conclude that the impact of the

1 breach on the accused's Charter-protected interests
2 tend toward being significant.

3

4 **SOCIETY'S INTERESTS IN ADJUDICATION ON THE**
5 **MERITS**

6 Society generally expects that criminal charges
7 will be determined on their merits. Society has a
8 collective interest ensuring that those who violate the
9 law are brought to trial and dealt with according to the
10 law. There is a public interest in seeking the truth,
11 which is a relevant consideration in the section 24(2)
12 analysis. As stated in *Grant* at paragraph 82:

13 The fact that the evidence obtained in breach of
14 the *Charter* may facilitate the discovery of the
15 truth and the adjudication of a case on its
16 merits must therefore be weighed against
17 factors pointing to exclusion in order to balance
18 the interests of truth with the integrity of the
19 justice system.

20 The reliability of the evidence is an important
21 factor to consider. As referred to in *Grant*, breaches
22 that undermine the reliability of the evidence favour
23 exclusion of the evidence. The admission of unreliable
24 evidence does not assist the public interest in
25 uncovering the truth and can undermine the accused's
26 right to a fair trial. However, the exclusion of relevant
27 and reliable evidence can undermine the truth-seeking

1 function of the justice system and render the trial unfair
2 from a public perspective which would bring the
3 administration of justice into disrepute. As noted in
4 Grant as well, reliability issues with physical evidence
5 will generally not be related to the *Charter* breach.

6 Other factors to consider will include the
7 importance of the evidence to the prosecution's case
8 and the serious of the offence in issue.

9 The evidence obtained in this case, the
10 cocaine, is highly reliable and relevant evidence. It is
11 critical to the Crown's case and essential to a
12 determination on the merits. The charges the accused
13 face are serious, and drug offences are serious, and
14 society has a significant interest in having drug
15 offences determined on their merits.

16 This court has been concerned about trafficking
17 in cocaine, and the offence has been treated seriously
18 by the courts in this jurisdiction for many years.
19 Balanced against this is that the seriousness of the
20 offences also makes it important that the accused's
21 rights be respected. The consequences if the accused
22 were convicted are high, and the possible penalty could
23 be a significant period of imprisonment. In serious
24 cases, there is an interest ensuring that the justice
25 system is beyond reproach.

26 Having considered the seriousness of the
27 *Charter* infringing state conduct, the impact of the

1 breach on the *Charter* protected interests of the
2 accused, and society's interest in the adjudication of
3 the case on its merits, a judge must determined
4 whether the admission of the evidence obtained by the
5 *Charter* breach would bring the administration of justice
6 into disrepute.

7 While society's interest in the adjudication on
8 the merits tends towards inclusion of the evidence, the
9 seriousness of the *Charter* infringing state conduct and
10 the impact of the interests of the accused favour
11 exclusion. The conduct of the police was serious, and
12 the impact of the breach on the accused was
13 significant. The value of the evidence is considerable,
14 and it is reliable evidence.

15 Society does have a significant interest in
16 having serious matters like these determined on their
17 merits while, at the same time, ensuring that those who
18 face serious charges are treated fairly.

19 In my view, balancing these factors weighs in
20 favour of exclusion and the admission of the evidence
21 would bring the admission of justice of disrepute.

22 For these reasons, I find that the evidence
23 seized following the execution of the search warrant in
24 Room 114 at the Chateau Nova Hotel should be
25 excluded.

26
27 **(PROCEEDINGS CONCLUDED)**

1 **CERTIFICATE OF TRANSCRIPT**

2 Neesons, the undersigned, hereby certify that the foregoing
3 pages are a complete and accurate transcript of the
4 proceedings transcribed from the audio recording to the best
5 of our skill and ability. Judicial amendments have been
6 applied to this transcript.

7
8 Dated at the City of Toronto, in the Province of Ontario, this
9 30th day of June, 2020.

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Kim Neeson

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Principal

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