*R v Glasgow-Brownlow* & *Taliani*, 2020 NWTSC 26 S-1-CR-2018-000120

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**IN THE MATTER OF:**

**HER MAJESTY THE QUEEN**

**-v-**

**QUINTIN GLASGOW-BROWNLOW and**

**MAHMOUD TALIANI**

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**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.**

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**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

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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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**REASONS FOR DECISION 1**

(REASONS FOR DECISION)

THE COURT:

**INTRODUCTION**

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

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

The Crown’s case was presented in the course of a *voir dire* held on February 10 through 12, 2020. There were three witness who testified on the *voir dire*: Constable Bryan Martell, the affiant of the ITO; Constable Kyle MacDonald; and Corporal Jim Strowbridge, two RCMP members who were involved in the surveillance at the Chateau Nova Hotel. A number of exhibits were also entered: a book of exhibits containing the ITO and a BlackBerry Messenger (BBM) chat, an agreed statement of facts, and several photographs.

**FACTS**

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

In the search of the room, RCMP members found a suitcase at the foot of one of the beds. The suitcase contained a luggage tag bearing the name of Quintin Glasgow-Brownlow and a 128 small baggies of crack cocaine weighing a total of 31 grams and a Sylvania CD player containing 20 baggies. Each of those baggies contained approximately 30 smaller baggies of crack cocaine for a total of 600 baggies. The 600 baggies, in total, weighed 165.2 grams of crack cocaine. The Sylvania CD player could be opened to access the crack cocaine using a screwdriver, which was located in another suitcase.

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

**INVESTIGATION**

As well, the background information which led the officers to the Chateau Nova Hotel on December 1, 2017, which is contained in the Information To Obtain in paragraphs 4 through 14 is not really in dispute. Counsel raised some issues with the accuracy of some of the information in the ITO such as with paragraph 12, but the real issue is with the accuracy of paragraphs 15(h) and, to an extent, 15(f), and I will address those issues later.

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

The Saskatoon Police advised that they had been contacted by J.M. who had been brought to Yellowknife to work in the sex trade, and she was with three males who were also in possession of drugs. They were in Room 23 at the Northern Lites Motel. J.M. was scared and wanted help getting away from these men.

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

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

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

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

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

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

J.M. described the three males to the police. She described Jonathan Sosa, who she called John, a black male named Chip, and another black male whose name did not know. J.M. also explained that there was a second vehicle, a Jeep Compass with Saskatchewan licence plate 647 KQY, en route to Yellowknife, believed to have more drugs brought by two black males, one of whom was the boyfriend of the Jeep’s owner.

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

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

On December 1, 2017, Corporal Strowbridge received a called from the Chateau Nova Hotel, advising that Mohamed Ali had just checked in. The officer had contacted the hotel the night before to see if the suspect males had checked in. Based on that information, surveillance was established at the Chateau Nova Hotel. A number of officers participated in the surveillance, and some of the communication between the officers was conducted through a BlackBerry Messenger chat.

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

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

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

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

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

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

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

The relevant observations from the BBM chat are: The first observation is at 2:33 p.m. when Corporal Strowbridge sees two guys in camo jackets. They go into the hotel. At that point, the officers are unclear if they are related to their suspects.

At 3:18 p.m., Constable MacDonald texted:

So not a crazy wrench but camo guy who we ID as UM3 and the new camo guy driving the Alberta rental were in the lobby together earlier and the rental guy asked the lady at the front desk for a second key to his room and gave it to UM3. I thought he said Room 141 but I am not sure if that room exists.

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

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

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

Constable MacDonald’s conclusion at 3:37 p.m. was:

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

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

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

Then, Corporal Strowbridge texted, also at 3:44, “Males returning.”

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

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

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

Sergeant Riou, who is not there, responded at 3:46 p.m., “kmac heard the door open and our targets appeared. Did not come out of 113, and the registered guests in 114 has a history of drug trafficking in Fort Mac.” Sergeant Riou then texted at 3:48, “Not uber- solid, but would slide through.”

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

So this is the relevant evidence from the BBM chat.

**THE LEGAL FRAMEWORK**

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 at the place of the proposed search.

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

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

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

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

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

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

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

The issue is not whether the allegations forming the basis of the ITO are true, but whether the affiant had a reasonable belief in the existence of the required statutory grounds. A sub-facial challenge hinges on what the affiant knew or ought to have known at the time the affidavit was sworn, and the accuracy of the affidavit is tested against the affiant’s reasonable belief at that time. *Phan*, paragraph 25, citing *World Bank Group* at paragraphs 119, 121.

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

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

As stated in *Sadikov* at paragraph 88:

The inquiry begins and ends with an assessment of whether the amplified record contains reliable evidence that might reasonably be believed on the basis of which the warrant could have issued.

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

**ANALYSIS**

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

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

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

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

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

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

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

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

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

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

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

The evidence does establish that Sosa, Chip, and the unknown black male camo guy were in the lobby together, and that the two camo guys were in the lobby together, but it is not clear to me on the evidence that all of these males: the two camo guys, Oullett-Gendron (Sosa), and Ali (Chip), were all observed together in the lobby, and if so, when and by who. So that is confusing, and I think it is fair to say that it was a confusing situation.

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

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

Constable MacDonald thought he heard the male say Room 141. It was determined that there was no Room 141 at the hotel. Inquiries with the hotel revealed that a white guy in a camo jacket came and asked for a key to Room 114.

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

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

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

It was apparent from the BBM chat that there was confusion and that it was an evolving situation. There are approximately 90 messages between 3:18 p.m. when Constable MacDonald first mentioned the possibility of a second room through to 3:57 p.m. when Constable MacDonald messaged that he would call Constable Martell.

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

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

Q: Essentially, the explanation that you received from him in relation to Room 114, specifically after the trio exited 113, went outside for a couple of minutes, and then return, was that he told you that — ‘he’ meaning Kyle — told you that he believed that the males went to Room 114.

A: Yes.

Q: Correct?

A: Yeah.

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

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

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

Q: All right. And specifically, you say at the last paragraph of your e-mail -- second-last, you say -- I apologize, the third-last paragraph:

Kyle told me at one point Kyle observed Oullett-Gendron, Mr. Ali, and the third male leave, and he believed they knocked at 114. A few minutes later, he heard what he believed to be the door of 114 open, and the same three went back to Unit 113. Kyle told me he believed they had gone into Unit 114 and then returned to 113.

That’s what you wrote.

A: Yeah.

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

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

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

Q: But that’s what he told you in the phone call.

A: He told -- so the sequence of events is what you’re saying, that they left 113, that they went down the hall, that they went out for a smoke, Jim sees them come back in. When I talked to Kyle, I said, ‘What happened with 114?’ And he said, ‘I heard a noise at the door or a knock at the door and then they -- the door closed, and they were there, and they went in 113.’ That was what mattered to me because at that point still I’m not certain of the grounds, and I need to know if this room is connected to the people we were investigating. That was Kyle telling me that it was, and that was -- that’s what was important to me, not if they went out for a smoke.

Later, again in cross-examination, Constable Martell testified:

Q: Okay. So when you called him, he told you they left 113 and knocked on the door of 114?

A: No. He said the whole sequence of that they had gone, went out for a smoke, and on the way back they went to 114, or he heard. He couldn’t see this. Again, he’s looking through a peephole and can only see 113. He says he heard a knock at the door to his right, and then the door opened, closed. They were there, and they went in 113. So I said, ‘Did they come from 114 and go to 113?’ And he said, ‘I -- I believe they did.’ So there was a whole -- as we’ve gone through, there was a whole sequence of down the hall, out for a smoke, and then back. But before coming back into 113, Kyle believed they went to 114.

Q: And remained there for a few minutes?

A: This is the phone conversation we had.

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

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

Constable MacDonald’s text message at 3:45 on the BBM chat was: “kk I just heard a door to my right close, and then all three guys who came out of 113 appeared. 114 is to my right.” In cross-examination, Constable MacDonald testified that he was not sure if he heard the door open or close but thought it was probably both. When asked about the phone conversation with Constable Martell, Constable MacDonald testified as follows:

Q: What did you talk about?

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

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

A: No.

Q: You wouldn’t exaggerate things to him, would you?

A: No.

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

A: No.

Q: I didn’t think so. Let me just expand on that. Did you tell him that when the three males exited 113, they went to 114 and remained inside 114 for a few minutes? Did you tell him that? Yes or no.

A: No.

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

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

Q: You didn’t observe Oullett-Gendron, Ali, and a third unknown male knock on the door of 114?

A: No, I didn’t see that.

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

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

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

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

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

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.’

That’s your note?

A: Correct.

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

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

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

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

Given what we know about the possibility that Constable MacDonald was mistaken about anyone going to or coming from Room 114, this is a significant discrepancy. It implies a direct link between Room 113 and Room 114 that just does not exist on the evidence. I find that this portion of the ITO is misleading.

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

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

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

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

Counsel for the applicants have made submissions about Constable Martell and Constable MacDonald and their credibility and who might be the officer who is not being truthful. And to be fair applicants’ counsel, I have not completely stated their arguments in this respect, and I do not intend to. It is a challenge to summarize their arguments about which police officer may not have been truthful without essentially repeating them, which I do not intend to do in this decision. I have considered their arguments, and I have considered the evidence of Constable Martell and Constable MacDonald closely. I do not know that I have to come to a firm conclusion about which officer has accurately testified as to the contents of the telephone conversation between them.

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

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

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

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

I am conscious of not requiring a standard of perfection of the police in completing an ITO, that is not required. And it is not required that all of the information in an ITO be determined to be ultimately true. It is an investigation. It is an ongoing process. And I recognize that this is an unusual situation. But in this case, the link with Room 114 was questionable and required scrutiny to determine if it had been established. The information that had been provided to Constable Martell should have caused him to ask questions to clarify the sequence of events and the observations of Constable MacDonald. In addition, what was ultimately included in paragraph 15(h) was not accurate based on the information that Constable Martell was aware of.

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

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

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

Therefore, I conclude that the search warrant could not have been issued on an assessment of the sub-facial validity. Given this conclusion, I have not addressed the arguments on facial validity. And while I have not addressed every argument raised in the applicants’ written submissions, I have considered them.

**SECTION 24(2) ANALYSIS**

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

Having found breaches of the accused’s *Charter* rights, the issue becomes whether the evidence should be excluded.

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

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

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

**THE SERIOUSNESS OF THE BREACH**

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

Whether the police were operating in good faith is another consideration in assessing the seriousness of the police conduct. However, the Court in *Grant* also noted that ignorance of *Charter* standards must not be encouraged, and negligence or willful blindness does not constitute good faith.

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

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

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

**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 breach on the accused’s Charter-protected interests tend toward being significant.

**SOCIETY’S INTERESTS IN ADJUDICATION ON THE MERITS**

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

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

The reliability of the evidence is an important factor to consider. As referred to in *Grant*, breaches that undermine the reliability of the evidence favour exclusion of the evidence. The admission of unreliable evidence does not assist the public interest in uncovering the truth and can undermine the accused’s right to a fair trial. However, the exclusion of relevant and reliable evidence can undermine the truth-seeking function of the justice system and render the trial unfair from a public perspective which would bring the administration of justice into disrepute. As noted in Grant as well, reliability issues with physical evidence will generally not be related to the *Charter* breach.

Other factors to consider will include the importance of the evidence to the prosecution’s case and the serious of the offence in issue.

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

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

Having considered the seriousness of the *Charter* infringing state conduct, the impact of the breach on the *Charter* protected interests of the accused, and society’s interest in the adjudication of the case on its merits, a judge must determined whether the admission of the evidence obtained by the *Charter* breach would bring the administration of justice into disrepute.

While society’s interest in the adjudication on the merits tends towards inclusion of the evidence, the seriousness of the *Charter* infringing state conduct and the impact of the interests of the accused favour exclusion. The conduct of the police was serious, and the impact of the breach on the accused was significant. The value of the evidence is considerable, and it is reliable evidence.

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

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

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

**(PROCEEDINGS CONCLUDED)**

**CERTIFICATE OF TRANSCRIPT**

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

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



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Kim Neeson

Principal