

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

ALI OMAR

RULING ON APPLICATION TO EXCLUDE EVIDENCE

I) INTRODUCTION

[1] Ali Omar is charged with having been in possession of proceeds of crime on March 9, 2019 in Inuvik. This charge stems from the execution of a search warrant at a room at Arctic Chalet, a hotel in Inuvik.

[2] Mr. Omar alleges that the evidence seized during the search should be excluded because it was obtained as a result of breaches of his rights protected by the *Canadian Charter of Rights and Freedoms* (the *Charter*). A *voir dire* into the admissibility of the evidence was held ahead of the trial to decide this issue. Some time ago I issued a Memorandum advising counsel that I had concluded that the evidence is admissible and that written reasons would follow. These are my reasons for having so concluded.

II) THE INFORMATION TO OBTAIN

[3] To provide context to what follows, I begin with an overview of the

Information To Obtain (ITO) sworn in support of the application for the search warrant.

[4] Cst. Ian Main swore the ITO. The information he relied on to form his grounds came from anonymous tips, a confidential informant, information conveyed to him by Cst. Scott Sanderson following a traffic stop of a vehicle driven by Mr. Omar, observations he made during brief periods of surveillance, and information obtained from one of the owners of Arctic Chalet. A copy of the ITO, redacted to protect the identity of the confidential informant, was filed at the *voir dire*.

[5] The ITO sets out a description of the police databases and police officers who are referenced in it, as well as introductory remarks and an overview. It provides particulars regarding the confidential informant. The information provided by the confidential informant is set out in a separate document identified as "Exhibit A" to the ITO.

[6] The ITO goes on to list a number of things under the heading "Grounds for Belief". This includes particulars of two tips received from anonymous complainants on March 6 and 7, 2019 to the effect that two black males were engaged in cocaine trafficking in Inuvik. Both tips describe the vehicle driven by these men as a Dodge Durango with licence plate #348368. One of the two tips included that the vehicle was blue.

[7] The ITO goes on to state that on March 7, Cst. Scott Sanderson conducted a traffic stop of a blue Dodge Durango and obtained information that he conveyed to Cst. Main: the driver identified himself as Ali Omar; the licence plate on the vehicle was #348368; the vehicle's registered owner was Olav Falsnes, one of the co-owners and operators of Arctic Chalet; Mr. Omar rented the vehicle from the owners of the Arctic Chalet; the passenger, a black male, did not provide any identification.

[8] In the next Paragraph of the ITO, Cst. Main sets out the results of police database searches regarding Mr. Omar, none of which were suggestive of any involvement in any past or present suspicious or criminal activity.

[9] Next, the ITO sets out information that Cst. Main obtained in a conversation he had on March 8, 2019 with Judy Falsnes, also a co-owner of the Arctic Chalet: on March 5th Mr. Omar rented from Arctic Chalet a blue Dodge Durango with licence plate #348368; on March 6th Mr. Omar returned to Arctic Chalet with

another man and rented the Family Room; Mr. Omar and the other man came and went multiple times, including at night; Ms. Falsnes felt that those activities were suspicious; several cabs stopped at Arctic Chalet over the previous two days, which, according to her, is very unusual.

[10] The ITO then sets out observations that Cst. Main made during surveillance he conducted on the Dodge Durango on March 7 and 8.

[11] On March 7, he observed 2 black men in the front seat of the vehicle and a passenger on the back seat. The passenger, which Cst. Main was able to identify as Delta Cardinal, was dropped off at an apartment building. Ms. Cardinal is a known user of crack cocaine and has been the subject of complaints on 9 files relating to suspected drug offenses.

[12] On March 8, Cst. Main conducted further surveillance on the vehicle. He recognized the same two individuals in the vehicle. They drove to various locations in Inuvik. The vehicle stopped at the Nova apartments; the passenger got out, went into the apartment building and came out within minutes; the vehicle then drove away and stopped in front of a house at 15 Franklin; again the passenger got out and went inside the house, coming out within minutes. The vehicle then drove off and stopped at Bob's Gas Cardlock on Industrial Road. A few minutes later another vehicle pulled up behind the Durango. The driver of that vehicle was Brent Arey. The passenger came out of the Durango, approached the passenger side of the other vehicle, and made a "hand to hand transaction" with the passenger through a rolled down window. Mr. Arey is the subject of complaint on three police files related to suspected drug offenses. Cst. Main deposes that the Nova Apartments and 15 Franklin are properties associated with drug use. He deposes that he believes that the activity he observed on March 8 was drug trafficking.

[13] In the final Paragraphs of the ITO, Cst. Main sets out the particulars of his belief about the evidence that will be found in the room rented by Mr. Omar at Arctic Chalet, based on his knowledge about how drug traffickers generally operate.

### III) THE CROSS-EXAMINATION OF CST. MAIN AND CST. SANDERSON

#### A. Scope of permissible cross-examination

[14] As part of his *Charter* application, Mr. Omar sought leave to cross-examine Cst. Main and Cst. Sanderson.

[15] The Crown conceded that leave to cross-examine Cst. Sanderson should be granted. The Crown also conceded that leave should be granted to cross-examine Cst. Main, but disagreed with some of the proposed areas of cross-examination.

[16] At the *voir dire*, I ruled on which areas of cross-examination would be permitted. These are my reasons for those conclusions.

[17] The principles that govern applications to cross-examine affiants were concisely and helpfully summarized in *R v Sadikov*, 2014 ONCA 72 and *R v Green*, 2015 ONCA 579.

[18] In exercising discretion in this area the trial judge must weigh competing interests, including the accused's right to make full answer and defence, the obligation to protect the identity of confidential informants, and the importance of making effective use of judicial resources by avoiding time-consuming and unnecessary proceedings. *Green*, para 31.

[19] The purpose of cross-examining an affiant is narrow: it is to attack the reliability of the content of the ITO. To obtain leave to cross-examine, the applicant must show a reasonable likelihood that the proposed cross-examination will elicit evidence that tends to discredit the existence of a pre-condition to the issuance of the warrant. It is often, as is the case here, to call into question the existence of reasonable and probable grounds. It may also be directed at the credibility or reliability of the affiant. *Sadikov*, paras 39-40.

[20] Cross-examination of the affiant will be allowed when the trial judge is satisfied that there is a reasonable likelihood that the proposed cross-examination will assist in determining whether the necessary grounds existed for the issuance of the warrant. The target of the cross-examination is the honesty of the affiant's belief and its reasonableness, as opposed to the ultimate accuracy of the information relied on. *Green*, paras 34-35.

[21] Counsel for Mr. Omar sought leave to cross-examine Cst. Main in the following areas:

- Aspects of his relationship with the confidential informant;
- Details of what he described as the “hand-to-hand transaction”;
- Additional particulars about Ms. Cardinal’s and Mr. Arey’s alleged connection with complaints regarding drug offenses;
- Additional particulars about the conversation with Ms. Falsnes;
- Additional details about the anonymous tips that were received.

[22] At the *voir dire*, I allowed cross-examination on some, but not all, of these areas.

[23] With respect to the anonymous tips, the ITO indicates that they are anonymous and of unknown reliability, and sets out what the tips were. They were conveyed to Cst. Main by other individuals. The information speaks for itself and is not, in my view, a proper area for cross-examination.

[24] Similarly, there is nothing ambiguous or vague about what was stated in the ITO regarding the information obtained from Ms. Falsnes. There is no basis to suggest that any of the information included in the ITO is potentially misleading. While cross-examination might have elicited additional details about the interaction between Cst. Main and Ms. Falsnes, the same argument could be made any time an ITO refers to information the affiant received from another person.

[25] Accordingly, with respect to the anonymous tips and the information obtained from Ms. Falsnes, I concluded that there was no reasonable likelihood that cross-examination would elicit evidence tending to discredit Cst. Main’s grounds for belief or call into question his reliability or his credibility.

[26] By contrast, Cst. Main's relationship with the confidential informant, how many times information had been provided by this person and whether it led to charges or convictions, the issue of monetary compensation and the source of the informant's knowledge are all matters that have a bearing on the reasonableness of Cst. Main's reliance on the information provided. Subject to questions that would trigger Informant Privilege, this is a proper area for cross-examination.

[27] As for the surveillance observations, the phrase "hand-to-hand transaction" is generic language that could describe a variety of things. Without further

clarification that language could be misleading. For that reason I permitted cross-examination in this area as well.

[28] Finally, the particulars of Ms. Cardinal's and Mr. Arey's connection with drug-related complaints were also proper areas for cross-examination. Additional details would provide context to the bare assertion that they were subjects of complaints regarding drug offenses. For example, cross-examination could clarify whether the complaints in question ever resulted in any charges or convictions against these individuals.

## B. Overview of evidence elicited through cross-examination

### 1. Cst. Main

[29] During his cross-examination, Cst. Main provided additional information that he acknowledged was not included in the ITO.

[30] With respect to the confidential informant, Cst. Main testified that including this investigation, this person had provided information on 4 occasions. In total, the information provided by this informant led to a total of 2 search warrants and to 1 conviction.

[31] Cst. Main testified that the confidential informant had been paid once for information provided. The informant was not paid for the information provided in this case. Cst. Main explained that a number of factors go into the decision to pay or not pay a confidential informant. On this occasion, Cst. Main did not request payment because the informant had received payment within the past six months and because in this instance, the informant merely provided confirmation of information that Cst. Main already had through the anonymous tips.

[32] Cst. Main acknowledged that the informant told him the source of his or her knowledge in this case and that this was not mentioned in the ITO.

[33] With respect to the surveillance he conducted, Cst. Main confirmed that on March 7 he did not observe any "hand-to-hand transactions" or anything else indicative of drug trafficking in the interactions with Ms. Cardinal.

[34] As for March 8, Cst. Main explained that he made his observations at Bob's Gas Cardlock from about 250 feet away from where the Dodge Durango was parked. He was using binoculars. He was asked to describe more precisely the "hand-to-hand transaction" he referred to in the ITO. He explained that he saw hands come together. During his testimony he demonstrated what he saw, one hand coming over the other, making a cupping. He did not see any specific item being exchanged but anything that was exchanged would have to have been small enough to fit in the palm of a hand. He only saw this happen once and he did not see any other interaction that suggested that drug trafficking was taking place.

[35] Finally, with respect to Ms. Cardinal and Mr. Arey, Cst. Main testified that neither of them have, to his knowledge, been charged under the *Controlled Drugs and Substances Act*.

## 2. Cst. Sanderson

[36] Cst. Sanderson's only involvement in this matter was the traffic stop he did of the Dodge Durango on March 7. Cst. Main had made him aware of the ongoing investigation, and of the description of the vehicle and persons that were of interest. Cst. Sanderson readily acknowledged that his sole purpose in stopping the vehicle was to ascertain the identity of its occupants in aid of the investigation.

## IV) WHETHER THE WARRANT SHOULD HAVE ISSUED

### A. Sufficiency of the grounds - legal framework

[37] I recently reviewed the legal framework that applies when a search warrant is challenged on the basis of insufficiency of grounds. *R v Khatib*, 2020 NWTSC 20, paras 4-14. The same framework applies here.

[38] For a search warrant to issue, the issuing justice must be satisfied by information under oath that there are reasonable and probable grounds to believe that an offence has been committed and that there is evidence to be found at the place to be searched. This standard involves the point where credibly-based probability replaces suspicion. *R v Clow*, 2012 ABQB 656, paras 9-10.

[39] The affiant's belief must be based on facts, whether based on personal

knowledge or on information provided by others. Mere assertion of belief by the affiant is not sufficient. The ITO must, in the totality of the circumstances, disclose a substantial basis for that belief. *Clow*, paras 11-13.

[40] An affiant is under a duty of full, fair and frank disclosure when swearing an ITO. All material facts must be included, whether favourable or unfavourable to the affiant's case. There should be no exaggerated or misleading statements in the ITO.

[41] To the extent that the affiant relies on information provided by others, the strength of that information must be weighed taking into account whether it is compelling, credible, and corroborated. The circumstances must be examined in their totality to determine whether information provided by others is capable of assisting in forming reasonable grounds. *R v Debot* [1989] 2 S.C.R. 1140.

[42] In reviewing the sufficiency of the grounds relied upon to issue a search warrant, the Court is not limited to the ITO itself. Evidence adduced at the *voir dire* from the affiant and sub-affiants is to be considered.

[43] If this evidence unveils errors or misleading information, this does not automatically vitiate the warrant. Erroneous or misleading information must however be removed from the analysis as to the sufficiency of the grounds. Information that was obtained illegally must also be removed. *R v Plant*, [1993] 3 S.C.R. 281.

[44] In addition, details that emerge from the *voir dire* may add context to statements in the ITO, which in turn may assist in determining whether, when that full context is considered, there were sufficient grounds for the warrant to issue.

[45] Minor errors that were made in good faith may be corrected. This process, referred to as "amplification", must be used sparingly. It cannot be relied on by the Crown to add substantive information that ought to have been included in the ITO so as to be used as an after-the-fact justification for the issuance of the warrant. *R v Araujo*, 2000 SCC 65, para 58; *R v Morelli*, 2010 SCC 8, para 41; *Clow*, para 23.

[46] Here, Mr. Omar argues that significant portions of the ITO should be disregarded in the analysis of the sufficiency of the grounds. He also argues that the strength of what remains should be assessed in light of the additional facts and



context brought out during Cst. Main's cross-examination.

[47] The Crown concedes that some of the statements identified by Mr. Omar should be removed, but not all of them. The Crown also agrees that the sufficiency of the grounds should be assessed with the benefit of the additional context that stems from Cst. Main's cross-examination. The Crown does not rely on amplification to rectify any errors in the ITO.

[48] The issue of what must be removed and added must be addressed before turning to analysis of the sufficiency of the grounds.

## B. Information to be disregarded or added

### 1. Confidential informant

[49] As noted above, Cst. Main's cross-examination brought out additional details about how often the confidential informant provided information and how often that information led to concrete results. In my view, those details do not make the information set out in the ITO misleading. It is not as though the informant had never in fact provided any information that led to results. In addition, as Cst. Main explained, he used the confidential informant to essentially corroborate information he already had from the anonymous tips. Similarly, the details elicited about the informant being paid on some occasions, but not on this occasion, do not raise any concern about the issuing justice having been misled. However, these details should be taken into account in the ultimate weighing of the grounds.

### 2. Traffic stop

[50] The Crown concedes that Cst. Sanderson breached Mr. Omar's rights during the traffic stop. A random vehicle stop is, by definition, an arbitrary detention. It can only be justified under section 1 of the *Charter* if in doing so the police are exercising powers conferred to them by statute, and within the limited highway-related purposes for which the powers were conferred. *R v Nolet*, 2010 SCC 24, para 22. Here the purpose of the traffic stop had nothing to do with the enforcement of motor vehicle legislation. Cst. Sanderson candidly acknowledged that his sole purpose in stopping the vehicle was to assist the ongoing drug investigation.

[51] In *Plant*, the Supreme Court of Canada made it clear that information obtained by police in breach of *Charter* rights, and later included in an ITO, cannot be relied on to support the sufficiency of the grounds:

This Court has determined that peace officers cannot benefit from their own illegal acts by including in informations sworn to obtain warrants facts which were retrieved through searches without lawful authority.

*Plant*, p.286

[52] As was noted by some courts, the result is anomalous: evidence obtained as a result of even a technical or inadvertent breach of the *Charter* is automatically disregarded when reviewing an ITO, whereas that same evidence, and even evidence obtained in a potentially more serious breach of the *Charter* may well be admitted at the trial itself, following an analysis pursuant to s. 24(2). *R v Chau*, [1997] O.J. No. 6322 (ONSC); *R v Jaser*, 2014 ONSC 6052.

[53] Anomalous as the consequences of the ruling in *Plant* may seem, until and unless these principles are revisited or refined by the Supreme Court of Canada itself, they are binding on this Court.

[54] The Crown concedes that Subparagraphs 4(c) to (g) of the ITO should be disregarded because the information contained therein was obtained from Mr. Omar during the illegal traffic stop. The Crown argues, however, that Subparagraphs (a) (the licence plate number of the vehicle) and (b) (the fact that the vehicle is registered to the co-owner of Arctic Chalet) should remain.

[55] Subparagraph 4(a) states the licence plate number of the vehicle stopped by Cst. Sanderson that day. The licence plate number was observable by Cst. Sanderson irrespective of the traffic stop. That being so, I see no reason to remove it from the ITO, but I also note that it adds nothing to the grounds: it does not link Mr. Omar to the vehicle, to unlawful activity, or to Arctic Chalet.

[56] Subparagraph 4(b) links the suspect vehicle to Arctic Chalet, the place ultimately searched. The Crown argues that this Subparagraph should not be disregarded because the information about the registered owner of the vehicle must have been or could have been obtained through a licence plate search, independently

from anything Mr. Omar told Cst. Sanderson.

[57] The problem with that submission is that there is no evidentiary basis for it. Cst. Sanderson did not testify that he did a licence plate check. As for Cst. Main, his evidence on this topic was very unclear. At first he testified he had done a query on the licence plate, but his evidence about when this took place in relation to other steps in the investigation was very unclear. When the Crown later attempted to clarify this, Cst. Main said that he could not say whether he conducted a licence plate query or not.

[58] It follows that on the evidence before me, the only source of information as to the registered owner of the vehicle was what Mr. Omar told Cst. Sanderson during the traffic stop. Given this, Subparagraph 4(b) must be removed from the ITO.

### 3. Information obtained from Judy Falsnes

[59] As I have already noted, on the evidence before me, the only reason Cst. Main was able to link the suspect vehicle to Arctic Chalet and ultimately obtain additional information from Ms. Falsnes was because of the information that Cst. Sanderson relayed to him. The information obtained from Ms. Falsnes derives from the traffic stop. Paragraph 6 must be disregarded for the same reason that Subparagraphs 4 (b) to (g) have to be.

### 4. Surveillance

[60] Any reference to Mr. Omar being the driver of the vehicle observed during the surveillance must be disregarded because the only reason Cst. Main knew the identity of the driver was because of the information obtained by Cst. Sanderson during the traffic stop.

[61] For the rest, in my view, none of the details provided by Cst. Main suggest that any of the information he included in the ITO about the surveillance should be disregarded.

[62] I recognize that generic language such as "hand-to-hand" transaction should be avoided and could be misleading in some cases. However, in light of Cst. Main's

evidence about what he saw and under what conditions, I do not find the use of that language was misleading in this case.

[63] It was also not inappropriate to include the information about Ms. Cardinal and Mr. Arey. It would have been preferable to make it clear that neither were charged or convicted of any drug offence, and this should be considered in assessing the strength of the grounds. However, it was neither improper nor misleading to indicate that these individuals were named in complaints or associated with complaints in drug matters. In my respectful view, to suggest otherwise is to impose too strict a limit as to what can properly be included in an ITO.

### C. Sufficiency of the grounds – analysis

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

[65] The review process is not a *de novo* assessment. The question is not whether this Court, presented with the same information, would have issued the warrant. The question is whether there was reliable evidence that might reasonably be believed on the basis of which the issuing justice *could* have issued the warrant. *Araujo*, para 54; *R v Morelli*, 2010 SCC 8, para 40; *R v James*, 2019 ONCA 288, para 52 (dissenting Reasons of Nordheimer JA adopted by the Supreme Court of Canada in *R v James*, 2019 SCC 52.)

[66] Bearing this in mind, I must examine whether, on the face of the "edited" ITO, there remains sufficient evidence to justify the issuance of a search warrant. I conclude that the combination of the two anonymous tips, the information provided by the confidential informant, and the observations made by Cst. Main during the surveillance, are sufficient to give rise to reasonable grounds to believe that the persons driving the blue Durango were engaged in illegal trafficking activity.

[67] The two anonymous tips came from persons of unknown reliability but were fairly specific and were consistent with one another. The tips were corroborated by the confidential informant who had, in the past provided information that had led to results. It was also corroborated by the observations that Cst. Main made during the surveillance, namely: the vehicle driving to multiple locations making short stops;

contact with individuals associated with the drug subculture; and the interaction Cst. Main observed at Bob's Gas Cardlock, where the exchange of a small object appears to have taken place.

[68] The insurmountable problem for the Crown, however, is that given my conclusions about aspects of the ITO that must be disregarded, the ITO does not disclose any link between the suspect vehicle and the place to be searched identified in the search warrant.

[69] The anonymous tips did not refer to the Arctic Chalet; neither did the information provided by the confidential informant. The surveillance did not place the vehicle at any time at the Arctic Chalet.

[70] I have not overlooked Subparagraph 8(e) of the ITO, where Cst. Main deposes that during the March 8 surveillance, he saw the suspect vehicle, which was on MacKenzie Road, "turn south on Airport road and travel in the direction of the Arctic Chalet".

[71] I believe I can take judicial notice of the general layout of these roads, as this Court sits in Inuvik regularly and has for many years: the Airport Road, as the name suggests, leads to the airport, which is several kilometers from its intersection with MacKenzie Road. While it is true that a vehicle turning south on Airport Road from Mackenzie Road would be heading in the direction of Arctic Chalet, that vehicle would be heading in the direction of many other places as well.

[72] For a search warrant to stand, the ITO must provide a credibly-based probability of nexus between the criminal activity and the location that is to be searched. *R v Liu*, 2014 BCCA 166. Once expunged of information that was illegally obtained through the traffic stop, the ITO in this case does not provide that link.

[73] I conclude that the search warrant in this case was not validly issued. It follows that the search at Arctic Chalet was a warrantless search that breached Mr. Omar's rights under section 8 of the *Charter*.

## V) WHETHER THE EVIDENCE SHOULD BE EXCLUDED

[74] Mr. Omar seeks the exclusion of the evidence. In doing so he relies on both the warrantless search of his hotel room and on the traffic stop which breached his rights under section 9 of the *Charter*.

[75] For the purposes of the *voir dire*, photographs that show the items seized were filed by consent. The photographs depict, among other things, a large amount of Canadian currency, a knife, and a scale with traces of white powder. The exact total amount of monies seized is disputed but for the purposes of the *voir dire*, Mr. Omar concedes it was in the range of \$60,000.00. Crown counsel advised that if the evidence seized during the search is excluded, the Crown will call no further evidence and will invite the Court to enter an acquittal on the charge.

[76] If admitted, the evidence would not be determinative. The Crown will adduce additional evidence to attempt to establish that the currency seized is proceeds of crime. This would include evidence that the white residue on the scale tested positive for cocaine. It may also include evidence extracted from other items seized and expert evidence. As there remained some dispute about that evidence at the time of the *voir dire*, I was not provided with any particulars of it.

[77] The purpose of s. 24(2) is to maintain the good repute of the administration of justice. That, in turn, must be understood in the long-term sense of maintaining the integrity of the justice system and the public's confidence in it. The inquiry is objective, and requires consideration of whether a reasonable person, informed of all the circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute. *R v Grant*, 2009 SCC 32, para 68.

[78] In addition to being long-term, the focus of s. 24(2) is also prospective. The fact that *Charter* rights were breached means that damage has already been done to the administration of justice. S. 24(2) seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system. *Grant*, para 69.

[79] Finally, the purpose of s. 24(2) is societal. It is not aimed at punishing the police or providing compensation to the accused, but rather, at systemic concerns. Its focus is on the broad impact of admission of the evidence on the long-term repute of the justice system. *Grant*, para 70.

[80] In determining whether evidence obtained in contravention of the *Charter* should be excluded, the court must assess and balance the effect of admission of the evidence on society's confidence in the justice system, having regard to three factors: the seriousness of the state infringing conduct; the impact on the *Charter*-protected interests of the accused; and society's interest in an adjudication of the case on the merits. *Grant; R v Harrison*, 2009 SCC 34.

[81] The task of the Court is to weigh these factors. There is no overarching rule that governs how the balance is to be struck. *Grant*, para 86. The balancing exercise that must be undertaken is a qualitative one. As the Supreme Court of Canada put it:

It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed.

*Harrison*, para 36.

[82] As was noted recently by our Court of Appeal:

Trial courts are directed to consider “all the circumstances” in the s 24(2) balancing exercise. They are to consider where to place the police conduct along a spectrum of fault, weigh the impact of the breach on the accused’s rights, and consider society’s interest in the adjudication of the case, including the reliability of the evidence.

*R v Paradis*, 2020 NWTCA 2, para 19.

[83] With these broad principles in mind, I turn to the analysis of each of the factors that must be considered.

#### Seriousness of state-infringing conduct

[84] State conduct that results in *Charter* violations varies in seriousness. There is a broad spectrum of conduct that can constitute a violation of a person's rights, from

inadvertent error to willful and reckless disregard. At its core, the task is to determine whether the state misconduct is such that the Court must dissociate itself from it in order not to bring the administration of justice into disrepute.

[85] Mr. Omar's counsel forcefully argued that the police misconduct in this case was very serious. He argued that Cst. Main acted in bad faith by being extremely careless in his drafting of the ITO and in instructing Cst. Sanderson to conduct an illegal stop of the vehicle to further the investigation.

[86] There is no evidence that Cst. Main instructed Cst. Sanderson to conduct an illegal stop. The evidence was that Cst. Main made other officers aware of the ongoing drug investigation and of a description of the vehicle that was of interest. Cst. Sanderson acknowledged that he was aware of the investigation but did not say he was instructed by Cst. Main or anyone else to stop the vehicle.

[87] I also disagree with the suggestion that Cst. Main was careless and showed blatant disregard for Mr. Omar's *Charter* rights when he drafted the ITO. He could and should have been more detailed and provided a fuller picture about certain topics, as I outlined earlier in this Ruling. In addition, knowing the licence plate number of the vehicle that was the subject-matter of the anonymous tips, he most definitely ought to have run a licence plate search to determine who the registered owner of that vehicle was.

[88] However, overall, I do not find that the evidence suggests that he was careless or cavalier about the matter. With the knowledge of the anonymous tips, he took a variety of investigative steps to advance the investigation: he sought to corroborate the information through a confidential informant who had provided information in the past; he conducted surveillance, albeit to a modest extent, on the suspect vehicle; after he received the information from Cst. Sanderson, he took steps to obtain additional information by speaking to Ms. Falsnes; and ultimately, he applied for a judicial authorization to search the premises.

[89] The place searched was Mr. Omar's hotel room, a place where his expectation of privacy was high. A hotel room is a place of residence, albeit usually a temporary one. It carries with it an expectation of privacy that is perhaps not as high as in one's home, but which is nonetheless significant. That makes the breach more serious than if the search had been conducted in another type of location.



[90] On the other hand, when the police conducted this search, they were acting on what they believed to be a valid judicial authorization. For the purposes of assessing the seriousness of police conduct, the fact that a search warrant was obtained is a relevant consideration. So are the reasons why the warrant was found to be invalid.

[91] Here, the search warrant fell because a crucial element of the ITO derived from the traffic stop. As I already noted, the evidence does not support the submission that Cst. Main instructed Cst. Sanderson to conduct an illegal stop of the vehicle. Cst. Sanderson acted on his own, because he was aware of the investigation.

[92] Cst. Sanderson ought to have known that he could not use his powers under motor vehicle legislation to gather evidence, especially self-incriminating evidence, from Mr. Omar in aid of a drug investigation. However, he did in fact limit his inquiries to what would have been legitimate inquiries under motor vehicle legislation. He did not search the vehicle or its occupants. I infer from his evidence that the stop was not long in duration. Cst. Sanderson was very candid in his testimony. He did not try to suggest that he had other reasons for stopping the vehicle. This is very different from what happened in *Harrison*.

[93] I reject the submission that Cst. Sanderson's actions amount to bad faith. At the same time, his lack of appreciation that his course of action was contrary to *Charter* principles does not equate to good faith. It is not a reason to treat the resulting breach as innocuous or inconsequential.

[94] Given how central the traffic stop was to my conclusion that the warrant was not validly issued, I find it useful to return to *Paradis*, as the *Charter* breaches in that case also stemmed from a traffic stop. The Court of Appeal summarized the facts of the case as follows:

(...) on October 2018, the appellant was driving a rented blue Volkswagen with Alberta plates in Fort Providence, Northwest Territories. Inside the glove box was some drug money and individually wrapped plastic packages of cocaine, totalling 1.3 grams. In a suitcase in the back seat was a hunting knife, a loaded AR-15 type semi-automatic rifle (of the design commonly known as the M-16, a restricted firearm) with a 40-round magazine inserted into it, without a trigger lock, and a bag containing spare parts for the rifle and additional cartridge ammunition. The trunk held a locked safe containing over \$4000 in cash and 131.41 grams of cocaine. The appellant was subject to a weapons prohibition at the time.

The appellant and his vehicle came to the attention of the police when a call came in over police radio advising that three males in a blue car were reportedly trafficking cocaine in Fort Providence, a small hamlet on the MacKenzie River. RCMP were busy at the time and so two traffic services members investigated the call, Cst Beck and Cst Bennett. They were advised that there had been several reports of males in a blue Volkswagen with Alberta plates driving in the area, dealing cocaine.

Cst Beck spotted the vehicle backed into a driveway beside a residential building and saw two males who were not locals, one carrying a black suitcase. Upon seeing Cst Beck's vehicle, the individuals shut their car doors and ran into the building.

The two constables decided to initiate a traffic stop of the car when it attempted to leave Fort Providence, and they did so. Cst Beck confirmed that the vehicle was a rental and then approached the driver's door; he observed that the interior of the vehicle was in disarray and saw the black suitcase. The appellant was asked for his licence, registration and insurance and appeared nervous, fumbling with his wallet when trying to retrieve his driver's licence, and slamming the glove box shut before opening it minimally to retrieve the documentation.

The appellant asked the constable why he was being stopped and was told that the RCMP had received a complaint of a couple of southern males in a blue car with an Alberta plate dealing cocaine. Cst Beck observed the appellant had difficulty handing over the rental agreement. He also observed the passenger's cell phone lighting up and the passenger appearing to attempt to hide the phone. The appellant was wearing a hoodie and the constable repeated an instruction several times to keep his hands where they were visible. When the appellant asked if he was being arrested, Cst Beck said that he was being detained for a drug trafficking investigation. The appellant was advised of his right to counsel and given a police caution. Cst Beck handcuffed the appellant and reached into the front pocket of his hoodie and pulled out what turned out to be a toque.

Cst Beck then arrested the appellant and again gave him the *Charter* warnings. The appellant was transported to the detachment and the vehicle was searched.

The trial judge found that at the point Cst Beck pulled over the appellant's vehicle, he did not have reasonable grounds to suspect that the appellant was connected to a particular crime and that the detention was reasonably necessary. She found that, as the initial detention was unlawful, the observations made after the vehicle stop could not be used to justify the detention or the subsequent arrest. Therefore, the detention and arrest were in violation of s 9 of the *Charter*.

The Crown conceded that ss 10(a) and (b) were both violated at the initial detention. Finally, as the initial detention and arrest were unlawful, so too were the searches

incidental to the arrest. (...)

*Paradis*, paras 2-9

[95] The trial judge had concluded that the actions of the police reflected a lack of care for the accused's *Charter* rights. She found that there were multiple *Charter* violations, all of which arose from a lack of recognition of *Charter* standards; that the officers' actions were not abusive, deliberate or taken in bad faith, but that this could not be equated with good faith. She found the conduct different in kind from that in *Harrison*, where the police officer showed blatant disregard for the accused's rights which was aggravated by his misleading testimony. In the end, she placed the police conduct on the mid to serious end of the spectrum described in *Grant*. *R v Paradis*, 2019 NWTSC 14, pp.40-43. The Court of Appeal saw no basis to interfere with that assessment.

[96] Here, of course, the place ultimately searched was a residence, which I recognize is an important distinguishing factor. But as I have already explained, the traffic stop was determinative in the search warrant being quashed. I find that as far as the breach of Mr. Omar's rights stemming from that stop, the police conduct in this case was lower, on the spectrum of seriousness, than it was in *Paradis*. And while the place searched was akin to a residence, the officers believed, at the time, that they had a valid warrant. On the whole, I would place the level of police misconduct in the middle to low range of the spectrum described in *Grant*.

#### Effect on *Charter*-protected interests of the accused

[97] This inquiry focuses on the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests. It calls for an evaluation of the extent to which the breach actually undermined the protected interest. The more serious the impact, the greater the risk that the admission of the evidence will bring the administration of justice into disrepute. *Grant*, para 76.

[98] The traffic stop in this case was brief, and not particularly intrusive. However, the impact that an arbitrary detention, even brief, has on someone, cannot be minimized. See *R v Le*, 2019 SCC 34.

[99] At the same time, the discoverability of the evidence can be taken into account in assessing the actual impact of the breach on the accused's protected interests. The

more likely it is that the evidence could have been obtained without the impugned conduct, the lesser impact of the breach on the accused's interests. *Grant*, para 122.

[100] In this case, the link between the vehicle and Arctic Chalet was highly discoverable, as it could be determined through a licence plate search. The same can be said of the additional information that was obtained from Ms. Falsnes. This reduces the impact that the traffic stop actually had on Mr. Omar's *Charter* protected interests.

[101] The same cannot be said of the search of the hotel room. As I already noted, a hotel room is akin to a residence. The section 8 breach had a serious impact on Mr. Omar's *Charter*-protected interests.

#### Society's Interest in an Adjudication on the Merits

[102] This inquiry reflects society's general expectation that criminal allegations will be adjudicated on their merits. It requires the court to consider not only the negative impact of admission of the evidence on the repute of the administration of justice, but also the impact of excluding the evidence. It reflects that the public interest in the truth-seeking function of the criminal justice system is a relevant consideration in a s.24(2) analysis. *Grant*, paras 79-81.

[103] Under this branch of the test, the reliability of the evidence is a factor to consider. If the breach undermines the reliability of the evidence, admission would detract from, not support, the truth-seeking function. Conversely, exclusion of relevant and reliable evidence may undermine the truth-seeking function and render the trial unfair from the public's perspective.

[104] The seriousness of the offence charged is a factor that can cut both ways. While the public may have a heightened interest in a determination on the merits when the charge is serious, it also has a vital interest in having a justice system that is above reproach, and this is particularly so when the stakes for the accused are high. *Grant*, para 84. In that sense, the seriousness of the offence may well be a factor to consider, but whatever arguments it creates in favour and against exclusion are bound to balance each other out. In the end, it is not a particularly helpful factor.

[105] In this case, the items that were seized in Mr. Omar's hotel constitute a crucial

element of the Crown's case. Their admission will not be conclusive, as the Crown would still have to prove beyond a reasonable doubt that the currency seized was in fact obtained through the commission of an offence, but without the evidence of what was seized, the Crown has no case. The exclusion of this evidence would put an end to the prosecution.

[106] Mr. Omar's counsel suggested that the items seized were not reliable because they do not, in and of themselves, prove the offence. In my respectful view, this confuses "reliability" with whether the evidence is determinative of the case. My understanding of the concept of reliability that is discussed in *Grant* is that it contrasts real evidence with other types of evidence, such as an accused's statement, which may be of questionable reliability particularly if it was obtained in contravention of *Charter* safeguards. The fact that the items seized are not determinative of the ultimate issue does not make them any less reliable.

[107] Mr. Omar's counsel argued as well that the allegations that Mr. Omar faces are at the lower end of the spectrum of seriousness as far as drug trafficking or proceeds charges. My own view is that the amount of money seized, in the context of a small northern community such as Inuvik, does not put this case at the lower end of the spectrum of seriousness at all. However, that does not really matter because as I already noted, the seriousness of the charge is a factor that can cut both ways.

### Balancing the Factors

[108] The balancing of the three considerations that enter an analysis under s. 24(2) of the *Charter* is always a delicate exercise. The different factors often point in different directions.

[109] Mr. Omar has referred to a number of cases where trial judges concluded that evidence obtained in contravention of the *Charter* should be excluded. Among others, he relied on *R v Gore*, 2017 ABQB 167 and *R v Hatton*, 2011 ABQB 242.

[110] These cases, and others Mr. Omar referred to during submissions, are helpful to bring out the legal principles and provide illustrations of their application. At the same time, as I already noted, the balancing that must be done under a s. 24(2) analysis is a very nuanced exercise. No two situations are ever actually exactly the

same. In particular, the assessment of where police conduct falls on the spectrum of seriousness is necessarily highly fact-driven and dependent on the judge's assessment of the overall circumstances, taking into account the full context.

[111] In this case, the impact of the search of the hotel room on Mr. Omar's rights was significant. The impact of the traffic stop on his rights was less significant. Globally, however, this factor, as is often the case, points towards excluding the evidence ultimately obtained.

[112] While the police conduct resulted in breaches of Mr. Omar's rights, I do not find it to be the type of serious conduct that the Court must dissociate itself from in order to maintain the repute of the justice system. Moreover, the evidence that was seized is crucial to the Crown's case. Even though it is not determinative of Mr. Omar's guilt, it is reliable real evidence going to some elements of the offence. Its admission would enhance, not detract from, the truth-seeking function of the process.

[113] The allegations in this case are that Mr. Omar was in possession of a significant amount of money generated from illegal activities he undertook while in Inuvik. Considering the context of small and isolated northern communities, there is a very high public interest in having these types of matters decided on their merits.

[114] While the impact of the breaches on Mr. Omar's rights would tend to favour the exclusion of the evidence, in my view, the other two considerations weigh heavily towards inclusion. I conclude that on balance, in all the circumstances it is the exclusion of the evidence, not its admission, that would bring the administration of justice into disrepute, in the community of Inuvik, and in the Northwest Territories in general.

## VI) CONCLUSION

[115] These were my reasons for dismissing Mr. Omar's Application to exclude the evidence seized at Arctic Chalet.

L.A. Charbonneau  
J.S.C.

Dated at Yellowknife, NT, this

13<sup>th</sup> day of October 2021

Counsel for Crown:	Jeffrey Major-Hansford
Counsel for Accused:	Lonnie Allen

IN THE SUPREME COURT OF THE  
NORTHWEST TERRITORIES

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BETWEEN:

HER MAJESTY THE QUEEN

- and -

ALI OMAR

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

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