

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

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**Respondent**

**-and-**

**G.L.**

**Applicant**

**Restriction on Publication**

Pursuant to s.486.4 of the *Criminal Code*, any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Pursuant to s. 648 of the *Criminal Code*, the proceedings referred to in this Ruling are subject to a publication ban until such time as the jury has retired to consider its verdict.

**RULING ON *CHARTER* APPLICATION**

[1] This is an application by the accused (“G.L.”) to exclude DNA evidence pursuant to s. 24(2) of the *Canadian Charter of Rights and Freedoms*, based on a breach of his s. 8 rights.

**BACKGROUND**

[2] In 2011 G.L. was sentenced to a term of 3 years and 5 months for sexual assault. The sentence included an order under s. 487.051 of the *Criminal Code* authorizing the police to collect bodily fluids for DNA analysis (the “Order”). On

its face, the Order stated it was to be executed “as soon as feasible”. It was executed approximately seven years later, on January 9, 2018, in Wekweètì.

[3] G.L. is now before the Court on a sexual assault charge. It allegedly occurred in May of 2016 in Wekweètì. The allegations are detailed later in these reasons.

[4] Evidence at the *voir dire* was provided by Cpl. Earl Hutchinson and Insp. Jeremie Landry. Cpl. Hutchinson was the commanding officer at the Gamèti detachment starting in June of 2017. Police services are provided to Wekweètì out of the Gamèti detachment. He gave evidence regarding his role in investigating the charge, including executing the Order and the steps he took to obtain a warrant to collect bodily substances from G.L. subsequently.

[5] Insp. Landry was the Corporal in Charge of Operations and the Court Liaison Officer in Behchokò from June 2012 to October of 2013. Among other things, his evidence covered internal procedures at the Behchokò detachment for handling orders like the one here. He also testified about how the RCMP uses the Police Records Occurrence System (“PROS”) and the Canadian Police Information System (“CPIC”). Counsel submitted a Joint Book of Evidence consisting of Occurrence Reports and Supplementary Occurrence Reports from PROS and documents from CPIC.

[6] The allegations forming the basis of the sexual assault charge are laid out in an Information to Obtain a Warrant to Take Bodily Substances for DNA Analysis (the “ITO”) sworn by Cpl. Hutchinson. The complainant had been drinking the night before at a residence. She awoke feeling that something had happened while she was sleeping. The first person she saw in the residence was G.L., whom she recognized. She told the police that she felt he may have sexually assaulted her. In her initial contact with the police, which was by telephone, she seemed confused. She could not say if she was dressed when she woke up, where in the residence she woke up or who else was there.

[7] The complainant was taken to the hospital in Yellowknife and a sexual assault kit was completed. DNA from an unknown male was found as part of that process.

[8] The complainant subsequently gave an audio recorded statement, which is summarized at paragraph 20(b) of the ITO. She said her boyfriend’s friend was trying to wake her up. She awoke in the living room. She was dressed and covered with a blanket. She had no recollection of consenting to sex the night before. On a scale of 1 to 10, with 10 being “blackout drunk”, she rated herself at an 8. There were other people in the residence.

[9] Police interviewed three other witnesses who had been present at the residence where the events are alleged to have occurred. None had seen anything happen. They all said they did not wish to provide statements.

[10] Cpl. Hutchinson took over the investigation in October or November of 2017 and in the course of that he discovered the outstanding Order. He did not execute it immediately. G.L. was living in Wekweètì at the time. Cp. Hutchinson explained that the RCMP from Gamètì does regular patrols to Wekweètì, but typically only once a month. This is a result of a number of factors, including: little demand for frequent police presence in Wekweètì; limited human resources; and the relative difficulty and cost of getting to Wekweètì, either by a 9 hour trip on a winter road or by charter aircraft.

[11] Cpl. Hutchinson and another officer travelled to Wekweètì and executed the order on January 9, 2018. The samples were collected in private and G.L. does not take issue with the manner in which collection was carried out. After the samples were collected, Cpl. Hutchinson asked G.L. if he would voluntarily provide a further sample in connection with the 2016 sexual assault. G.L. declined to do so.

[12] The samples were sent for analysis. On March 13, 2018 Cpl. Hutchinson was notified by the National Data Bank that they matched the male DNA collected from the complainant in this case.

[13] Cpl. Hutchinson proceeded to draft the ITO to obtain the DNA warrant. He testified that he had little experience in doing so. He sought and obtained advice through the Major Crimes Unit with the RCMP in Yellowknife. It went back and forth a few times. No substantive changes were suggested and no one brought up the age of the Order.

[14] The fact that the Order was executed in January of 2018 and that it resulted in a DNA match was included in the ITO; however, the age of the Order was not.

[15] Cpl. Hutchinson himself had no concerns with the age the Order. He did not recall discussing the delay in its execution with anyone and if he had, it would have been a very general inquiry. He did not seek any legal advice about it. He was not aware of any standard timelines for executing post-conviction orders of this nature.

[16] Insp. Landry became aware of the Order in 2012 when he arrived in Behchokò. He arrived to a significant backlog of files which required post-trial review. He explained that DNA orders issued in Yellowknife would typically be mailed from the detachment there to the local detachment, in this case Behchokò. That would take an average of two weeks. Once received, it would be handed over

to the lead investigator or the Court Liaison Officer for follow up. Eventually, it would be assigned, usually to the lead investigator, as a “task” in PROS. Once the task was completed, it would be submitted for approval.

[17] The list of tasks relating to G.L.’s 2011 conviction shows that the Order was not entered as a task until 2016. Further, the Order was not entered into CPIC, which had to be done separately at the time. Insp. Landry thought that the delay in “tasking” the Order in PROS was due to human error.

[18] When the Order was entered as a task in 2016, it came with the instruction to execute it. It was assigned to Cst. Skriver in Behchokò on September 26, 2016. There are notations on the PROS task sheet and the Supplementary Occurrence Reports contained in the Joint Book of Evidence which summarize what the RCMP did to locate G.L. and execute the Order.

[19] Upon having it assigned to him, Cst. Skriver called Bailey House. That is a temporary men’s shelter in Yellowknife where G.L. had stayed shortly after he was released from prison following the 2011 conviction. Bailey House staff were unable to provide information about where G.L. was living. Cst. Skriver also contacted G.L.’s parole officer. She advised she no longer had contact with him as a client, but that she had seen him recently in Yellowknife. She also advised that G.L. had a sister in Yellowknife with whom he might be residing. Cst. Skriver found an old address in Yellowknife where G.L. reportedly lived at certain points.

[20] RCMP officers in Yellowknife followed up at the address. They spoke to residents there and obtained information that suggested G.L. was living in Behchokò. That information is contained in a Supplementary Occurrence Report dated December 11, 2016.

[21] The file was reviewed again in relation to the Order on June 26, 2017. Cst. Morris of the RCMP in Behchokò contacted who he thought was G.L. and asked him to attend at the detachment. That turned out to be an individual with the same name, not in any way connected to the Order. Cst. Morris called a community member who knew G.L. She had not seen him in a couple of years. He tried several telephone numbers in the PROS system to reach another associate, but he was unsuccessful. On August 20, 2017 he noted there was “no new occurrence showing up for [G.L.]” and that he would follow up with G.L.’s family. On October 27, 2017 Cst. Morris made a note indicating he had spoken with Cpl. Hutchinson who had received information that G.L. was residing in Wekweètì.

[22] In addition to the arrest for the sexual assault charge in this case, G.L. had a number of interactions with the RCMP in both Behchokò and Yellowknife between the time he was released following the 2011 conviction and when the Order was finally executed. Between the time the Order was rediscovered and “tasked” in PROS on September 26, 2011, G.L. had the following interactions with the police:

- a. On October 14, 2016 at 10:45 p.m. the police attended a call in downtown Yellowknife where G.L. was reported to have been involved in a fight. The officers spoke with G.L. who denied involvement. He was not arrested.
- b. On December 6 and continuing to December 7, 2016 G.L. was apprehended on a mischief complaint in Yellowknife. I infer that while in cells, he expressed suicidal ideation and was taken to hospital. He was later released from hospital but held in cells overnight due to a complaint by nursing staff that he was causing a disturbance at the hospital.
- c. On December 10, 2016 the police were called to a residence in Yellowknife where G.L. lived from time to time. The police spoke with G.L. No other action was taken.
- d. On January 4, 2017 the police attended the same Yellowknife residence following a complaint that someone had been kicked in the head. It is not clear if police actually spoke with G.L.
- e. On January 5, 2017 in the early morning the police in Yellowknife received a complaint from a woman saying G.L. was outside banging on her door. The police spoke to G.L. No arrest was made.
- f. G.L. is listed as and “involved person” in an occurrence summary dated January 28, 2017. The complaint was a group of people fighting at a party in Yellowknife. G.L. was not arrested and it does not appear anyone spoke to him.

## **ISSUE**

[23] The Crown concedes that the Order was not executed as soon as feasible and that the information about the DNA match at the National Data Bank should therefore be excised from the ITO. The Crown also concedes that without the information about the DNA match, the warrant would not have issued. Accordingly,

the sole issue relates to s. 24(2) of the *Charter*, specifically, whether admitting the DNA evidence would bring the administration of justice into disrepute.

[24] In answering this question, the Court must consider three factors: the seriousness of the police conduct; the impact of the breach on the accused's *Charter*-protected rights; and society's interest in the adjudication of the case on its merits. *R v Le*, 2019 SCC 34 at paras 141-142; *R v Grant*, 2009 SCC 32 at para 71, [2009] 2 SCR 353.

## ANALYSIS

### *The Seriousness of the Police Conduct*

[25] There are two aspects to the police conduct. The first is the failure to execute the Order until 2018. The second is the failure to disclose in the ITO that the Order was not executed for several years after it was made.

[26] As set out in *R v Le*, at para 143, the starting point in assessing the seriousness of the police conduct is to consider it on a continuum of culpability, with inadvertent and technical breaches at one end and conduct that demonstrates flagrant disregard for *Charter* rights at the other. This engages consideration of whether the police were acting in good faith, which must be reasonable and which is not demonstrated by negligence. Moreover, an absence of bad faith does not mean the actions is taken in good faith. The Crown must demonstrate that the police "conducted themselves in [a] manner . . . consistent with what they subjectively, reasonably, and non-negligently believe[d] to be the law". *R v Le*, at para 147, citing *R v Washington*, 2007 BCCA 540 at para 78.

[27] G.L.'s counsel did not suggest that the police acted in bad faith in failing to execute the Order "as soon as feasible", nor did he suggest Cpl. Hutchinson deliberately misled the judge who issued the DNA warrant or concealed evidence in the ITO. Nevertheless, he argues the police conduct was substandard.

[28] Certainly, the police conduct here was not perfect, but I do not agree that either aspect of the police conduct is substandard or negligent.

[29] In an ideal world the Order would have been executed while G.L. was serving his sentence or even shortly after his release. No explanation was offered as to why it did not happen that way. As far as the police are concerned, however, I find this was an innocent error.

[30] Insp. Landry's evidence was that there was a filing, tasking and follow up system in place when the Order arrived at the Behchokò detachment. That system was not perfect, but in my view, it had enough checks and balances to be considered reliable. There is no evidence that the procedures in place at the time were substandard. Had they been, I expect there would have been ample evidence of multiple "mis-filings" and "lost" documents. Unfortunately, all filing systems have some element of human action and accordingly, they are all susceptible to the consequences of human error from time to time.

[31] In this case it appears that it was by virtue of human error that this *particular* Order did not make it into the system and consequently, it did not get "tasked" or flagged for follow up. It took some time to discover that and as soon as it was, the Order was "tasked" in PROS.

[32] The police did not execute the Order immediately after it was rediscovered and "tasked" in 2016, but they did not sit idle. The evidence shows the police made efforts to find G.L. in both Yellowknife and Behchokò. They were unsuccessful. Again, in an ideal world, the police would have made a more concerted effort to find G.L. and execute the Order. Like all public organizations, however, the police do not have unlimited resources and must prioritize investigations and assignments. Finding G.L. and executing the Order obviously yielded to other police priorities. Considering the efforts that the police did make, however, I am unable to conclude that the police were negligent or substandard in their approach.

[33] The fact that G.L. had a number of interactions with the police between when he was released from prison and when the Order was finally executed makes little difference in the circumstances. The interactions prior to September 2016 took place while the Order, though duly made, was "lost" in the filing system. The police were unaware of it. With respect to the interactions that occurred after September 2016, most of these were fleeting interactions and some did not involve much interaction at all. Only one, the December 6 and 7, 2016 occurrence, involved an arrest. Mr. Lafferty was held in cells. He was intoxicated and expressed suicidal ideation. It is hard to imagine that executing or arranging to execute the outstanding Order would have been at the forefront of priorities in dealing with G.L.

[34] Turning to Cpl. Hutchinson's failure to disclose the Order's age in the ITO, I start with the well-founded premise that warrants and orders sought on an *ex parte* basis call for full and complete disclosure of all material facts, even those that may

militate against granting the relief sought. *R v Araujo* 2000 SCC 65, [2000] 2 SCR 992. The logic is simple: the judge or justice who is asked to grant the relief does not have the benefit of hearing the full argument and the relief granted can have a significant effect on the person is ultimately subject to it. It is a high expectation that must be faithfully adhered to by justice system participants and scrupulously enforced by the courts. A democratic society demands nothing less.

[35] In this case, the failure to include the age of the Order in the ITO was a result of innocent oversight. It was not a deliberate or strategic omission intended to bolster the application for the warrant. The omission was made in good faith. Further, it is highly unlikely that including the information would have changed the result.

[36] What Cpl. Hutchinson and the RCMP had before them, and what Cpl. Hutchinson executed on January 8, 2018, was on its face a *valid and subsisting* Order. It did not have a specific expiry date. Cpl. Hutchinson testified that he was not aware of any particular time parameters for executing post-conviction orders.

[37] Cpl. Hutchinson was frank in stating that at the time he prepared the ITO, he had no training in preparing them. He sought and obtained assistance and advice from the Major Crimes Unit in preparing the document. The document went back and forth a number of times and there were several discussions. The age of the Order was not identified as a material fact to be included in the ITO. Cpl. Hutchinson relied on the assistance and advice he received from the Major Crimes Unit. In my view, it was reasonable for him to do so.

[38] One of the questions put to Cpl. Hutchinson was whether he sought legal advice. In my view, this was not something he would have been expected to do in the circumstances. The application for the warrant was not complicated. The facts were straightforward: There was a complaint of a sexual assault; there was DNA evidence from the complainant; that DNA matched G.L.'s DNA collected in relation to an unrelated conviction. As noted, the time it took to execute the Order was not identified as a material fact.

[39] As noted, I am not convinced that having the information about the age of the Order would have caused the issuing judge to refuse to grant the warrant. The key evidence was that DNA samples were obtained from the complainant in the course of a sexual assault investigation, which matched those obtained from G.L. pursuant to the Order. That evidence is, on its own, very compelling. Moreover, there is no



evidence I am aware of to suggest that the passage of time will change the essential identifying characteristics of human DNA.

[40] I conclude that both the time it took to execute the Order and the failure to include that information in the ITO in support of the DNA warrant were at most minor breaches, made in good faith. The police conduct falls on the less serious end of the spectrum.

*Impact of the breach on G.L.'s Charter-protected rights*

[41] Just like the seriousness of the police conduct, the impact of a *Charter* breach on accused spans a continuum from minor effects to those that are significantly intrusive in nature.

[42] Collection of bodily fluids, and its impact on accused, was specifically addressed in *Grant*, at para 109:

[. . .] In the context of bodily evidence obtained in violation of s. 8, this inquiry requires the court to examine the degree to which the search and seizure intruded upon the privacy, bodily integrity and human dignity of the accused. The seriousness of the intrusion on the accused may vary greatly. At one end of the spectrum, one finds the forcible taking of blood samples or dental impressions (as in *Stillman*). At the other end of the spectrum lie relatively innocuous procedures such as fingerprinting or iris-recognition technology. The greater the intrusion on these interests, the more important it is that a court exclude the evidence in order to substantiate the *Charter* rights of the accused.

[43] G.L. argues that executing the DNA warrant falls at the more serious end of the spectrum, resulting in the forcible violation of his person to obtain blood samples for DNA analysis. While what happened here is not entirely innocuous, I do not share his view.

[44] It is true that blood had to be extracted from G.L., along with hair samples and mucous swabs. The latter two collections methods are, in my view, completely innocuous.

[45] The blood collection process included using a lancet to pierce his finger to obtain blood. That is a violation of bodily integrity and certainly, not as innocuous as collecting hair and mucous samples. Nevertheless, it was minimally intrusive and in my view, had a relatively insignificant impact on G.L.

[46] The process that the police followed was compliant with what is set out in the *Criminal Code*. Although decided in a different context, that process itself, ie., a finger prick with a lancet, swabs and hair collection, has been held to be minimally invasive. *R v Rodgers*, 2006 SCC 15, [2006] 1 SCR 544; *R v Morris* 2009 ABCA 303, 2009 CarswellAlta 1429. Further, the context of a s. 24(2) application, the Ontario Superior Court of Justice in *R v Justinico*, 2006 ONSC 539, 2016 CarswellOnt 2463 that this sample collection process had a minimal impact on the accused.

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

[47] The question here is whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. The Court must consider reliability of the evidence, its importance to the Crown's case and the seriousness of the offence. *R v Le*.

[48] The charge in this case is sexual assault. That is an extremely serious offence and one that comes before this Court with disturbing regularity. Jurisprudence from both the Northwest Territories and elsewhere describes the often life-changing impact it can have on victims. Our society has a very significant interest in, and a reasonable and high expectation of, seeing sexual assault cases decided on their merits.

[49] DNA evidence has proven reliability. It is no longer novel science and has not been so considered for some time. Further, without the DNA evidence, the Crown's case is not particularly strong. The complainant was drinking alcohol and does not have a clear memory of what happened. Other potential witnesses could not offer information and expressed reluctance to provide statements or be involved.

[50] In all of these circumstances, excluding the evidence would significantly impair the Court's truth seeking function. This factor strongly favours admission.

## **CONCLUSION**

[51] Confidence in the administration of justice would be seriously undermined if the DNA evidence was excluded. The breach was minor and made in good faith. The impact on G.L. was minimally intrusive. Excluding the evidence would interfere with the truth seeking function of the trial process.

[52] The application to exclude the DNA evidence is dismissed.

K. M. Shaner  
J.S.C.

Dated at Yellowknife, NT, this  
19<sup>th</sup> day of March 2020

Counsel for the Applicant:

Charles Davison

Counsel for the Respondent:

Billi Wun  
Duane Praught

IN THE SUPREME COURT OF THE  
NORTHWEST TERRITORIES

---

BETWEEN

HER MAJESTY THE QUEEN

Respondent

-and-

G.L.

Applicant

**Restriction on Publication**

Pursuant to s.486.4 of the *Criminal Code*, any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Pursuant to s. 648 of the *Criminal Code*, the proceedings referred to in this Ruling are subject to a publication ban until such time as the jury has retired to consider its verdict.

---

RULING ON *CHARTER* APPLICATION BY  
THE HONOURABLE JUSTICE K. M. SHANER

---