

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

MICHELLE CHARLOTTE SCHMITZ

REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE

Heard at: Hay River, Northwest Territories

Date of Written Decision: December 18, 2014

Date *Voir Dire* Heard: July 7 to 11, 2014

Counsel for the Crown: Laura Wheeler

Counsel for the Accused: Richard C. Gibbs, Q.C.

Ruling on *voir dire* on admissibility of evidence
[Sections 4(4) and 5(4) of the *Controlled Drugs and Substances Act*]

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

MICHELLE CHARLOTTE SCHMITZ

A. INTRODUCTION

A.1 Issue

[1] On September 8, 2014, I gave an oral decision with respect to a *voir dire* which was heard in Hay River, NT from July 7 to 11, 2014. These are the written reasons for that decision.

[2] At 1:00 p.m. on Sunday, June 2, 2013, a member of the RCMP received information from a confidential human source that the accused, Michelle Schmitz, would be driving back to Hay River from Alberta with a “load of marijuana.” Acting on this information, police officers stopped the truck driven by the accused at 4:44 p.m. on the highway between Alberta and Hay River. Sherlock, the drug sniffer dog, was brought to the location and indicated the presence of marijuana on the truck. The truck was searched. About two pounds of marijuana were located on top of the spare tire under the truck. The accused seeks to have the marijuana and certain words she said to the police excluded as evidence. She asserts that her rights under the *Canadian Charter of Rights and Freedoms* have been violated.

A.2 Charges

[3] Michelle Charlotte Schmitz is charged that she:

- (a) on or about the 2nd day of June, 2013 A.D. at or near the Town of Hay River in the Northwest Territories, did unlawfully possess a substance included in Schedule II to wit cannabis marijuana in an amount exceeding 30 grams contrary to section 4(4) of the *Controlled Drugs and Substances Act*; and

- (b) on or about the 2nd day of June, 2013 A.D. at or near the Town of Hay River in the Northwest Territories, did unlawfully possess a substance included in Schedule II to wit cannabis marijuana in an amount not exceeding 3 kg for the purpose of trafficking contrary to section 5(4) of the *Controlled Drugs and Substances Act*.

A.3 Trial History

[4] The trial proceeded by way of two *voir dire*s, the evidence from which will be blended with the trial: one *voir dire*, with respect to the admissibility of a statement given by the accused to the investigating officer and recorded on video; the other *voir dire*, with respect to the admissibility of marijuana found above the spare tire under the accused's pickup truck and for certain oral statements made by Ms. Schmitz.

[5] Counsel for Ms. Schmitz has admitted the jurisdiction of the Court, the identity of the accused and the date upon which the events took place.

[6] The Crown called six witnesses: Cst. Philip Unger, Cst. Jeffrey Steven Butt, Cpl. Robert Nason, Cpl. Grant Stebanuk and Olive Herbert.

[7] After the Crown had called all its witnesses, we dealt first with the *voir dire* with respect to the admissibility of Ms. Schmitz' video-taped statement to Cst. Unger at the RCMP detachment. The issue was whether or not the statement was voluntary. The defence did not call evidence on this *voir dire* and I ruled, in reasons given orally, that the statement was admissible.

[8] Then the Court dealt with the *voir dire* with respect to the *Charter* application as set out in the Notice of Motion filed on April 28, 2014. The Notice of Motion alleges infringements of sections 8 and 9 of the *Charter* and seeks the following relief:

- (a) Exclusion from evidence of any marijuana seized in the police investigation that led to this proceeding before the Court; and
- (b) Exclusion from evidence of any statements made by the accused in the police investigation that led to this proceeding before the Court.

[9] With respect to this second *voir dire*, the defence called three witnesses: Ann Lobb, Wanda Robertson and the accused, Michelle Schmitz. During its submissions, the defence also alleged breaches under sections 10(a) and 10(b) of the *Charter*.

[10] In order to analyze the alleged *Charter* breaches, it is necessary to first examine the facts in greater detail.

B. OUTLINE OF THE FACTS

[11] This case begins with information obtained from a confidential human informant. The confidential informant phoned Cpl. Grant Stebanuk, who is the dog handler, at his home in Hay River on Sunday, June 2, 2013. Cpl. Stebanuk considered the informant to be reliable and the information to be reliable. The information, according to Cpl. Stebanuk, was that Michelle Schmitz would be returning to Hay River that evening with a load of marijuana and that she would be driving her grey Ford pickup truck. Cpl. Stebanuk phoned Cst. Unger, who was off duty, and gave him this information. Cst. Unger asked his partner in Traffic Services, Cst. Butt, to assist him. Cst. Unger recalls being told that Ms. Schmitz was going to be travelling northbound from Alberta with a load of marijuana and that Ms. Schmitz owned the vehicle that was being used to transport the marijuana.

[12] Highway #2 leads from Hay River, Northwest Territories to Enterprise, Northwest Territories. At Enterprise, Highway #2 intersects Highway #1, which goes south from Enterprise to Alberta and north from Enterprise to Yellowknife. The officers were in separate vehicles on Highway #1 going southbound towards the Alberta border: Cst. Unger's police truck followed by Cst. Butt's police car. They were looking for the pickup driven by Ms. Schmitz. It was first seen by Cst. Unger, who asked Cst. Butt to check the licence plate to confirm that it was hers. Cst. Butt stopped Ms. Schmitz for speeding at 102 kph where the posted speed was 90 kph. Cst. Unger arrived on the scene and detained Ms. Schmitz for the investigation of possession of marijuana for the purpose of trafficking. He gave Ms. Schmitz her *Charter* rights and police caution. She was placed in the back of his police truck.

[13] Cst. Unger called for the police dog services. Cpl. Stebanuk arrived with his police dog, Sherlock. Sherlock indicated drugs on the pickup driven by Ms. Schmitz. Ms. Schmitz was advised that the dog smelled drugs in her pickup. The officers conducted a search of the pickup and located the marijuana in two garbage bags on top of the spare tire. The spare tire had been stored under the pickup and held in place by a chain and clamp. The spare tire was raised and lowered by placing a rod assembly through a hole in the bumper and turning the rod.

[14] Ms. Schmitz was placed under arrest and taken to the police detachment in Hay River, where she was interviewed by Cst. Unger and then released.

[15] The time line for these events is as follows:

1:00 p.m.	Cst. Unger receives information from Cpl. Stebanuk that Michelle Schmitz was travelling northbound in a pickup truck from Alberta with a load of marijuana and that this information came from a reliable confidential human source and the information was reliable.
2:00 p.m.	Cst. Unger meets with Cst. Butt at the junction of Highway #3 and #1.
4:41 p.m.	Cst. Butt stops vehicle driven by Ms. Schmitz at km 52 on Highway #1 and asks for driver's licence, vehicle registration and insurance.
4:47 p.m.	Cst. Unger arrives on scene; asks Ms. Schmitz where she is coming from, detains Ms. Schmitz for investigation and reads <i>Charter</i> rights and police warning. Ms. Schmitz does not want to speak to a lawyer.
4:55 p.m.	Cst. Stebanuk, in Hay River, receives call from Cst. Unger, at km 52, requesting Police Dog Services.
5:35 p.m.	Cst. Stebanuk and police dog, Sherlock arrive on scene.
	After dog indicates drugs, Cst. Unger "may have arrested Ms. Schmitz at that time, but can't remember."
	Pickup truck is searched and garbage bag containing four Ziploc baggies of marijuana, each weighing approximately ½ pound are located. Total weight is 960.3 grams.
6:07 p.m.	Cst. Unger places Ms. Schmitz under arrest for possession for the purpose of trafficking; reads <i>Charter</i> rights and police warning (6:08 p.m.). In response to "Do you want to call a lawyer?" Ms. Schmitz responds, "Well I am going to have to."
	Cst. Unger and Ms. Schmitz travel in police truck to RCMP detachment in Hay River. Certain oral statements are made by Ms. Schmitz.
6:57 p.m.	Ms. Schmitz speaks to legal aid lawyer from 6:57 p.m. to 7:04 p.m.
8:00 p.m.	Cst. Unger starts warned statement of Ms. Schmitz.
9:43 p.m.	End of warned statement of Ms. Schmitz.
11:30 p.m.	Ms. Schmitz is released by Cst. Unger.

C. THE APPLICABLE LAW

C.1 Introduction

[16] The legal framework for the stop and detention of Michelle Schmitz, the deployment of the sniffer dog, the search of her vehicle, her arrest and her verbal comments to Cst. Unger consists of a number of legal principles which have to be identified and then dealt with separately.

[17] In this decision, I will first deal with the legal principles involving the seizure of the marijuana and then, the oral statements to Cst. Unger.

C.2 Seizure of Marijuana

[18] In broad terms, the analysis of the events leading to the seizure of the marijuana involves:

- (a) the stop of the vehicle and an investigative detention,
- (b) the deployment of the sniffer dog, and
- (c) the search of the vehicle.

[19] The applicable legal framework for each of these events is as follows. First, with respect to an investigative detention, the Supreme Court in *R. v. Mann*, [2004] 3 S.C.R. 59, set out the guiding principles governing the use of a police power to detain for investigative purposes. These principles were summarized by Professor Stuart in *Charter Justice in Canadian Criminal Law*, 5th ed. (Toronto Carswell, 2011) at p.333:

- (a) Police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary.
- (b) Where a police officer's reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual.
- (c) Both the detention and the pat-down search must be conducted in a reasonable manner.
- (d) The investigative detention should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by police.

[20] In the context of a motor vehicle stop, there are other reasons for the detention. Since the operation of a motor vehicle on a public roadway is regulated, the police have the power to stop a motor vehicle to check to see that the vehicle is registered and insured; that the driver is licensed; that the vehicle is mechanically fit; and that the driver is not impaired by fatigue, alcohol or drugs. The police cannot use these powers to stop a vehicle as a pretext for other reasons. See paragraphs 19 to 26 of *R. v. Brandon Larocque*, 2014 NWTTC 03.

[21] The principles of law governing the use of a sniffer dog were described in *R. v. Chehil*, [2013] S.C.J. No. 49:

19 The deployment of a single-profile narcotic dog (a dog trained to detect certain kinds of illegal drugs using its sense of smell) is a search that does not require prior judicial authorization. However, in order for a sniff search to be *Charter*-compliant, it must meet the criteria for unauthorized searches laid out in *R. v. Collins*, [1987] 1 S.C.R. 265. As such, when sniffer dogs are engaged by the police, the deployment must be authorized by a reasonable law (in this case, the common law), and the manner in which the sniff search was conducted must be reasonable. In *Kang-Brown*, a majority of the Court found that the decision to deploy a sniffer dog meets the *Collins* test where the police have a reasonable suspicion based on objective, ascertainable facts that evidence of an offence will be discovered: see *Kang-Brown*, at paras. 60, per Binnie J.; 188-94, per Deschamps J.; and 244, per Bastarache J. Further, as I will explain, a sniff search is conducted reasonably where the sniffer dog used was properly trained and handled.

[22] The definition of a “reasonable suspicion” was given by Justice Binnie in *R. v. Kang-Brown*, 2008 SCC 18:

The “reasonable suspicion” standard is not a new juridical standard called into existence for the purposes of this case. “Suspicion” is an expectation that the targeted individual is possibly engaged in some criminal activity. A “reasonable” suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds.

[23] Justice Karakatsanis in *Chehil*, *supra*, at paragraphs 28 to 34 made the following additional points about reasonable suspicion:

- (a) A reasonable suspicion must be assessed against the totality of the circumstances;
- (b) The suspicion held by the police cannot be so broad that it descends to the level of generalized suspicion;
- (c) The fact that reasonable suspicion deals with possibilities, rather than probabilities, means that in some cases, the police will reasonably suspect that an innocent person is involved in crime;
- (d) Some factors give rise to reasonable suspicion on their own, while others are capable of innocent explanation and cannot give rise to reasonable suspicion unless coupled with other factors;
- (e) Police are required to consider all the information available to them, including possible innocent explanations; however, that does not impose a duty on the police to seek out exculpatory factors or rule out possible innocent explanations.

[24] After there is a positive indication from a sniffer dog, the police can seek consent for a search or, if there are reasonable and probable grounds that the individual has committed an offence, arrest the individual and proceed with a search incident to arrest. At paragraph 55 of *Chehil*, the Court stated:

55 Once a sniffer dog has delivered a positive indication, the police often seek consent for a verification search. Provided that the consent is properly sought and obtained, the search will respect s. 8 of the Charter: see *R. v. Borden*, [1994] 3 S.C.R. 145. Alternately, the police may determine that they have the grounds required under the *Charter* to proceed with a warrantless arrest, namely reasonable and probable grounds to believe that the accused has committed an offence: see *R. v. Storrey*, [1990] 1 S.C.R. 241, at pp. 249-51. If the arrest is validly made, the police may conduct a search incident to arrest in order to secure evidence that could be used at the accused's trial: see *Caslake*. That is what occurred in this case, and in the majority of reported cases dealing with sniff searches occurring post-*Kang-Brown* in which the police conducted a search to confirm the presence of drugs.

[25] In the course of submissions by Crown and defence, the Court was provided with the following cases: *R. v. Caslake*, [1998] 1 S.C.R. 51, *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220, *R. v. Debot*, [1989] 2 S.C.R. 1140, *R. v. Harrison*, [2009] 2 S.C.R. 494, *R. v. Kang-Brown*, [2008] 1 S.C.R. 456, *R. v. MacKenzie*, 2013 SCC 50, 3 S.C.R. 250, *R. v. Payette*, 2010 BCCA 392, *R. v. Suberu*, 2009 SCC 33. I have carefully considered the submissions regarding these cases and their application to the facts in this case.

C.3 Oral Statements to Cst. Unger

[26] Immediately upon detaining an accused, the police have the duty to advise the accused of her right to consult counsel, *R. v. Prosper*, [1994] 3 S.C.R. 236. The police have a further duty not to elicit responses from an accused person who has indicated her desire to speak to a lawyer until that opportunity has been provided. This duty to "hold off" was expressed in *R. v. Manninen*, [1987] 1 S.C.R. 1233 at paragraph 23 where Justice Lamer, as he then was, stated:

Further, s. 10(b) imposes on the police the duty to cease questioning or otherwise attempting to elicit evidence from the detainee until he has had a reasonable opportunity to retain and instruct counsel. The purpose of the right to counsel is to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights. In this case, the police officers correctly informed the respondent of his right to remain silent and the main function of counsel would be to confirm the existence of that right and then to advise him as to how to exercise it. For the right to counsel to be effective, the detainee must have access to this advice before he is questioned or otherwise required to provide evidence.

[27] This duty was further explained in *R. v. Prosper, supra*, at paragraph 34:

... Once a detainee has indicated a desire to exercise his or her right to counsel, the state is required to provide him or her with a reasonable opportunity in which to do so. In addition, state agents must refrain from eliciting incriminatory evidence from the detainee until he or she has had a reasonable opportunity to reach counsel. As the majority indicated in *R. v. Ross*, [1989] 1 S.C.R. 3, at p. 12, once a detainee asserts his or her right to counsel, the police cannot in any way compel him or her to make a decision or participate in a process which could ultimately have an adverse effect in the conduct of an eventual trial until that person has had a reasonable opportunity to exercise that right. In other words, the police are obliged to “hold off” from attempting to elicit incriminatory evidence from the detainee until he or she has had a reasonable opportunity to reach counsel.

D. APPLICATION OF THE LAW

D.1 Introduction to Vehicle Stop and Search

[28] The following are issues with respect to the vehicle stop, the deployment of the sniffer dog and the vehicle search:

- (a) Given the nature of the confidential tip, were there sufficient grounds to have a reasonable suspicion that Michelle Schmitz was transporting marijuana?
 - (i) What is the effect on the “reasonable suspicion” if the informant is unknown and there is no confirmation of the criminal aspects of the tip?
 - (ii) Did Cst. Unger have a “reasonable suspicion” prior to asking Michelle Schmitz where she was coming from?
 - (iii) What was the effect of the observations by Cst. Unger such as the key chain with a single key in the ignition, Visine near the driver, fast food wrappers, no overnight bag or suitcase visible and strong and fresh odour of perfume?
- (b) Even if there was a reasonable suspicion, are there problems with the traffic stop?
 - (i) Was the traffic stop invalid if Michelle Schmitz was not speeding?
 - (ii) Was 1½ hours, including the wait of 40 minutes for the sniffer dog to arrive, too long for an “investigative detention?”

- (c) In the absence of arresting Michelle Schmitz after the sniffer dog indicated the presence of marijuana, did the police have authority to search her truck?

D.2 Reasonable Suspicion

[29] The first step in the analysis is to determine whether or not there were grounds for stopping the truck which Ms. Schmitz was driving. For the reasons indicated below, this was not a traffic stop for the purposes of checking registration, insurance, driver's licence, mechanical fitness or sobriety. It was a detention for the purpose of a drug investigation. As such, the police had to have a reasonable suspicion that Ms. Schmitz was transporting marijuana in her vehicle.

[30] Cst. Unger was clear in his testimony that prior to stopping Ms. Schmitz's vehicle, it was his intent to stop the vehicle matching the description which the informant gave to Cpl. Stebanuk and with the licence plate which Cst. Unger had confirmed for the purpose of conducting a drug investigation. This was not a situation where a vehicle was stopped for speeding and as a result of the officer's observations, the officer formed the reasonable suspicion that the driver was transporting drugs. Cst. Butt was unequivocal that he stopped the Schmitz truck because he and Cst. Unger were doing a drug investigation.

[31] For the reasons that I will indicate later, I find that the Schmitz truck was speeding, i.e., travelling at 102 kph in a 90 kph speed zone; however, the real reason for the stop was to investigate for drugs. In order for this stop and investigative detention to be lawful, the officers must have had a reasonable suspicion that the vehicle and occupant were connected to an offence and that the detention was necessary. In this case, Cst. Unger was suspicious that Ms. Schmitz was transporting marijuana in her truck.

[32] In order for the sniffer dog search to be lawful, the officers must have had a reasonable suspicion that evidence of an offence would be discovered. Again, Cst. Unger was suspicious that Ms. Schmitz was transporting marijuana in her truck.

[33] If at the point that the Schmitz truck was stopped, there was reasonable suspicion that she was transporting marijuana, there was a lawful basis for both the investigative detention and the sniffer dog search.

[34] What information, then, did Cst. Unger have at the point in time when Cst. Butt stopped Michelle Schmitz's truck? Cst. Unger had been advised by Cpl. Stebanuk that Michelle Schmitz was going to be travelling northbound in a pickup truck from Alberta with a load of marijuana. This information came from a confidential human source who had contacted Cpl. Stebanuk.

[35] Cst. Unger testified that Cpl. Stebanuk provided him with the confidential informant's name and that Cst. Unger was a second handler with respect to that source. Cst. Unger did not know the specifics of the past reliability of that source. Cst. Unger testified that Cpl. Stebanuk told him that the source of the information and the information itself were reliable.

[36] Following the receipt of the information, Cst. Unger confirmed that there were two vehicles registered to Michelle Schmitz. He also drove by her residence and confirmed that one of the vehicles, the car, was parked there and the pickup truck was not.

[37] At that moment, the RCMP were in possession of information believed to be reliable from a source who was believed to be reliable that Michelle Schmitz would be returning to Hay River from Alberta that evening with a load of marijuana and that she would be driving her grey Ford pickup truck. Cst. Unger had confirmed that Ms. Schmitz owned a grey Ford pickup truck and that it was not at her residence in Hay River.

[38] Did the police have the objective basis for the reasonable suspicion that Ms. Schmitz was transporting a substantial quantity of marijuana and therefore have the grounds to stop her vehicle for investigation?

[39] At this step in the analysis, counsel for the accused makes three submissions:

- (a) A bald assertion by Cst. Stebanuk that the informant was reliable and the information was reliable is insufficient to provide the grounds for reasonable suspicion. Cst. Unger should have satisfied himself as to the reliability of both the source and the information.
- (b) Cst. Unger testified that in order to have the reasonable suspicion to believe that Ms. Schmitz was in possession of a controlled substance for the purpose of trafficking, he asked her where she was coming from and she said she was coming from Calgary. If the Court excludes this answer, then Cst. Unger did not have the subjective grounds for reasonable suspicion.
- (c) When Cst. Unger approached the Schmitz vehicle, he made observations which, based on his training, were of possible indicators of drug transportation. These were completely neutral factors and should not be considered by the Court in assessing whether grounds for reasonable suspicion existed.

[40] Let me deal with each of these submissions, in turn.

The Reliability of the Informant

[41] A reasonable suspicion that a person is committing an offence is very different from a reasonable belief that a person is committing an offence. As the Supreme Court of Canada said in *Chehil*, a reasonable suspicion is based on possibilities; a reasonable belief is based on probabilities.

[42] This fundamental difference means that the caselaw about reasonable and probable grounds for an arrest or for a search warrant cannot simply be applied to reasonable suspicion for an investigative detention or a sniffer dog search.

[43] In the situation where reasonable and probable grounds are required, such as, for example, to grant a search warrant, there must be more than a bald statement that an informant or information is “reliable”. There must be evidence that objectively establishes the reliability of the informant and the information. This type of evidence is not required where the standard is reasonable suspicion.

[44] Cst. Unger was told by Cpl. Stebanuk that the information was reliable and the source of the information was reliable. Cst. Unger knew that the informant was not anonymous. In fact, the informant was someone for whom Cst. Unger was a second handler, meaning that Cst. Unger was involved in making “payments and meets”; i.e., the informer had a previous link to the RCMP.

[45] Counsel for Michelle Schmitz submits that these are insufficient grounds to form a reasonable suspicion. More is required. Otherwise, there is a danger to all innocent motorists. Defence submits that an individual has the right to drive his vehicle from Alberta to Hay River. If he is obeying the rules of the road, is properly licensed and insured and is not committing any crimes, the driver should not be detained by the police and have a dog sniff his car for drugs. If the police are able to detain and sniff a motor vehicle based on an unconfirmed “tip”, then there is a danger that all innocent motorists are a risk of being stopped because some “informant” has phoned the police with an unsubstantiated tip.

[46] Anyone who knew that Michelle Schmitz had been in Alberta and was driving back to Hay River on Sunday afternoon could phone the police and claim that she was transporting drugs. At the point that Michelle Schmitz was stopped on the highway, the police had confirmed that she was driving her truck from Alberta. This was confirmation only of the legal aspects of the informant’s information. It was not confirmation that she was doing anything illegal. It did not distinguish Michelle Schmitz from any of the many other drivers travelling from Alberta to the Northwest Territories. There was absolutely no confirmation that she was transporting drugs.

[47] Defence counsel used the analogy of a black swan among white swans. My understanding of this analogy is that confirmation of “swan-like” characteristics of a bird does not assist in determining whether it is black or white. That the bird has a long neck, feathers and webbed feet does not confirm that it is black, only that it is a swan. That the police confirmed that Michelle Schmitz was driving a pickup truck from Alberta on Sunday afternoon does nothing to confirm the black swan trait, i.e., that she was transporting drugs.

[48] Let me respond to this defence submission. It is possible that the information from the confidential informant could be third-hand hearsay or information from someone who was seeking to harass Michelle Schmitz. On the other hand, this was information from an informer known to Cst. Stebanuk who would have to provide an explanation if the information turned out to be false. Cst. Stebanuk considered both the informer and the information to be reliable. He was not challenged in Court on those assertions. Given this basis, was it reasonable for Cst. Unger to ground a suspicion that Michelle Schmitz was bringing in marijuana?

[49] A similar fact situation was considered by the Manitoba Court of Appeal in *R. v. Campbell*, 2003 MBCA 76. In *Campbell*, the police received an anonymous tip that the accused would be transporting a substantial amount of marijuana in the near future under the guise of attending snowmobile races. The vehicle was described, along with the licence number and the accused’s occupation. A couple of weeks later, the same informant called to say the vehicle was *en route* and referred to the same licence number.

[50] The Court determined that there were not “reasonable and probable grounds” for an arrest or search. The Court adopted the words of Doherty J.A. in *R. v. Lewis (1997)*, 122 C.C.C. (3d) 481 (Ont. C.A.) at p.490:

The Crown’s position comes down to this. If a person shows up at the airport and acts exactly as one would expect a normal traveller to act, that person is subject to arrest if an anonymous, unproven tipster has predicted that the person would attend at the airport in possession of cocaine and act like a normal traveller. I cannot accept that contention. Absent confirmation of details other than details which describe innocent and commonplace conduct, information supplied by an untested, anonymous informant cannot, standing alone, provide reasonable grounds for an arrest or search.

[51] However, the Court readily found that the tip was sufficient to give the detaining officer reasonable cause to suspect that the accused was transporting marijuana. At paragraph 36, the Court stated:

Applying these definitions, I have no difficulty in concluding that articulable cause to stop and detain the accused was present in this case. The decisions in *R. v. Lal (1998)*, 130 C.C.C. (3d) 413 (B.C.C.A) and *R. v. Lewis (1997)*, 122 C.C.C. (3d) 481 (Ont. C.A.) are particularly relevant. In both cases the sources of the information was unknown and

the reliability of the tip therefore somewhat suspect, but the detailed aspect of the tips, while not amounting to reasonable grounds, were still sufficient to enable the courts to conclude that there was compelling current information which reasonably led the officers to suspect that a crime was being or was about to be committed.

[52] Looking at the totality of the circumstances to assess the reasonableness of the suspicion that Michelle Schmitz was transporting marijuana, I find that there were reasonable grounds to have such a suspicion.

Cst. Unger's Subjective Belief

[53] Counsel for the defence submits that even if there were objective grounds for the reasonable suspicion that Ms. Schmitz was transporting marijuana, Cst. Unger, himself, did not have the reasonable suspicion. In other words, the subjective grounds did not exist.

[54] This defence submission is based on the testimony of Cst. Unger. In cross-examining Cst. Unger, defence counsel established that the officers intended to stop the pickup truck driven by Ms. Schmitz as soon as it was located and to detain it for investigation of drugs so long as Ms. Schmitz was driving.

[55] Cst. Unger also stated that he needed to have Ms. Schmitz answer that she was coming from Alberta and once he had that answer, he believed he had "reasonable suspicion to believe that Ms. Schmitz was in possession of a controlled substance for the purpose of trafficking."

[56] Defence counsel submits that when the RCMP stopped Ms. Schmitz for speeding, she was actually detained for a drug intervention. She should have been given her section 10(a) and 10(b) *Charter* rights and police caution. Instead Cst. Unger asked a question for the purpose of obtaining the crucial response that he needed in order to have the reasonable suspicion required for an investigative detention. Once he received the answer, he formed the reasonable suspicion.

[57] If I accept the defence argument, it means that Cst. Unger did not have the subjective grounds, i.e., he did not have the reasonable suspicion that the pickup truck driven by Ms. Schmitz was involved in a drug offence until he had the answer to his question. If the answer to the question was given in breach of her section 10(a) and section 10(b) *Charter* rights and is excluded, then Cst. Unger would not have the reasonable suspicion necessary for the investigative detention.

[58] The short answer to this argument is that Cst. Unger felt he had the necessary grounds to stop the vehicle for an investigative detention. As has been discussed earlier, the necessary grounds for an investigative detention are grounds for a "reasonable suspicion." It follows, therefore, that Cst. Unger felt he had

grounds for a “reasonable suspicion.” Despite this, for some reason, Cst. Unger felt that it was also necessary to confirm as much of the information from the informant as possible before having a “reasonable suspicion.”

[59] The relevant portions of Cst. Unger’s testimony with respect to his characterization of the grounds that he had with respect to Michelle Schmitz are contained in the following extracts:

Q: Once you had received that confirmation, that it was a vehicle belonging to Ms. Schmitz, based on everything that you’ve learned and observed up to that point did you have any suspicion in your mind about what might be going on in that vehicle?

A: Yes, I mean, I didn’t know if Ms. Schmitz was the driver yet. Constable Butt hadn’t – at that point in time hadn’t confirmed who was driving, but it was a vehicle that we believed we were looking for that should be in possession of a significant quantity of marijuana.

Q: So just to be clear, what was it that you suspected about that vehicle at that time?

A: That it would have a significant quantity of marijuana, which in an investigation would hopefully be an amount that would be possession for the purpose of trafficking.

...

Q: When you first approached the vehicle did you feel that you had grounds to detain Ms. Schmitz?

A: Basically what I was doing was I was confirming the information which I had received from Corporal Stebanuk with regards to the information about Ms. Schmitz coming northbound. So I was just trying to be as prudent as possible and confirm all the information. So I had already, you know, confirmed that Ms. Schmitz does have a vehicle, a pickup truck that was registered to her. At that point now I’ve confirmed that Ms. Schmitz is driving that pickup truck, and again, the information was that she was coming from Alberta. So again, at every traffic stop, when we’re talking to someone, I always ask them where are you coming from today, where are you heading to? Some of that is to ensure that they’re not fatigued as well, because like for some reason if you thought they were impaired, which was not the case here, but – so I asked that question.

Q: So when you first approached the vehicle did you feel at that time that you had the grounds to detain her?

A: As soon as I asked that question about where were you coming from and she had stated Alberta, at that point I confirmed as much of the source information as I could, and so that’s when I had – I believe I had reasonable suspicion to believe that Ms. Schmitz was in possession of a controlled substance for the purpose of trafficking.

Q: And why was it that you didn’t feel that you had these grounds before that point?

A: Again, I was new, I am new, or was new to source work at that point in time, and I just wanted to try to validate all the information that I had received before I went and detained someone or arrested or whatever I was going to do

...

Q: I put it to you that that your plan with Constable Butt was if we locate the vehicle bearing this plate traveling northbound we are going to stop it.

A: That's correct.

Q: And you were going to stop it for a drugs investigation?

A: That is correct.

Q: There's just no chance that that vehicle was going to be allowed to proceed on its way if you folks encountered it. It was going to be stopped?

A: It was going to be stopped to confirm the identity of the occupants.

Q: So sir, the decision to stop that vehicle, whether it was being driven at the speed limit, slightly below the speed limit, at any speed, it was going to be stopped. True?

A: That is correct, sir.

Q: And it was going to be stopped in order to further a drugs investigation?

A: Yes, sir.

Q: And the furtherance or the furthering of that drugs investigation was going to start with identifying whether it was Ms. Schmitz or somebody else who was in the vehicle?

A: That's correct.

...

Q: But you recognized Ms. Schmitz?

A: As soon as I got up to the passenger window I did recognize Ms. Schmitz.

...

Q: So from the time you walked up to the vehicle and saw that it was Ms. Schmitz there was no scenario that could have involved Constable Butt filling out the traffic ticket, handing it to her and saying you're free to go. That wasn't happening, correct?

A: No, it wasn't.

...

A: Again, I was just trying to confirm as much information as I could from the source to ensure that I had reasonable suspicion to take Michelle Schmitz out of that vehicle and put her in my police vehicle and give her rights.

Q: Sir, I take it from what you're saying, that you felt the need to confirm the source's information that she was coming from Alberta?

A: That's right. Again, I have not had a lot of dealings with source information, and so I wanted to confirm as much as I could.

...

Q: And despite detaining her and knowing that she didn't know her real jeopardy was that you were investigating her for drugs, you went on to question her before giving her her rights, didn't you?

A: Yes, I asked that one question about where she was coming from.

Q: Because it was a crucial question to you, wasn't it?

A: Had she given a different answer I definitely would have stepped back and had to put everything together

Q: Right, because as far as you were concerned this was a crucial question that you wanted answered to confirm the last bit of confirmable information from Corporal Stebanuk's source in order to ensure you had reasonable suspicions, correct?

A: Yes.

Q: So you deliberately questioned a detained person without giving her her rights, correct?

A: Yes, sir.

Q: And you did that to obtain a key piece of evidence to formulate your reasonable suspicions. True?

A: It was definitely a piece.

[emphasis added]

[60] Cst. Unger is clear in his testimony that knowing Ms. Schmitz was coming from Alberta was a piece of evidence required to formulate his reasonable suspicions. According to Cst. Unger, these reasonable suspicions were necessary to take Michelle Schmitz out of her vehicle, put her in Cst. Unger's police vehicle and give the accused her *Charter* rights and police caution.

[61] Cst. Unger's testimony about "reasonable suspicion" and his decision to detain is confusing and somewhat contradictory. On one hand, he testified that it was his intention to detain the described vehicle and Ms. Schmitz once he confirmed that the truck was travelling northbound and that Ms. Schmitz was

driving. On the other hand, Cst. Unger testified that hearing Ms. Schmitz say she was coming from Alberta was a piece of evidence required to formulate his reasonable suspicion.

[62] These contradictions and confusion may be caused by a confusion between “reasonable grounds” and “reasonable suspicion”. This confusion was referenced by Justice Moldaver in *R. v. MacKenzie*

38 Parenthetically, I note that the reference in *Mann* to “reasonable grounds to detain” has led to some confusion for the bench and bar alike. In the context of detention, “reasonable grounds” means reasonable grounds to suspect that an individual is involved in particular criminal activity, which is synonymous with reasonable suspicion. However, in other contexts, such as an arrest, “reasonable grounds” means reasonable grounds to believe that an individual is or has been involved in a particular offence, which is synonymous with reasonable and probable grounds. The former concept is a matter of possibilities, while the latter is one of probabilities. See *Chehil*, at para. 27; *Kang-Brown*, at para. 164, per Deschamps J. [emphasis added]

[63] The testimony of Cst. Unger indicates that he had a suspicion that the truck driven by Ms. Schmitz would have a significant quantity of marijuana and therefore, she was committing an offence under the *Controlled Drugs and Substances Act*. This suspicion was based on reasonable grounds. By the definition given by Justice Moldaver, Cst. Unger had a reasonable suspicion.

[64] That Cst. Unger seems to equate “reasonable suspicion” with the requirement that each of the grounds be confirmed independently does not detract from the evidence that the suspicion that he held was based on reasonable grounds.

[65] Since the concept of “reasonable suspicion” is based on possibilities, there is a real possibility that the suspicion may turn out to be false. As new facts are learned, these facts will increase, decrease, confirm or possibly disprove the suspicion. Cst. Unger believed he had the grounds to detain Ms. Schmitz when he stopped her vehicle. That Ms. Schmitz was driving the vehicle and coming from Alberta confirmed the suspicion that he already had. Had Ms. Schmitz not been in the truck or had the truck being travelling southbound from Yellowknife, it may not have been reasonable for Cst. Unger to continue to have the suspicion.

[66] As I will indicate later, I agree with the defence submission that Ms. Schmitz should have been informed of the real reason for the police stopping her truck, i.e., for a drug investigation and that she should have been provided with her section 10(a) *Charter* rights. As a result, her conversation with Cst. Unger about where she was coming from and what she was doing there should be excluded.

[67] In my view, however, the exclusion of this conversation does not affect the reasonableness of the suspicion that Ms. Schmitz was transporting marijuana. In

the absence of Ms. Schmitz telling Cst. Unger where she was coming from, it was apparent she was coming from Alberta. She was stopped by the police at km 52 of Highway #1. Her vehicle was travelling northbound. The nearest town to the south of km 52 was in Alberta. She had a bag which was labelled as being from McDonald's. The nearest McDonald's south of km 52 was in Peace River, Alberta.

[68] Cst. Unger had both the objective and subjective suspicion based on reasonable grounds that Ms. Schmitz was transporting marijuana at the time of her detention and when he called for the sniffer dog.

Observations made by Cst. Unger

[69] Cst. Unger identified a number of observations which he considered to be relevant to his investigation and which came out of the Enhanced Awareness Course specific to drug investigations. These observations which he considered to be possible indicators of someone involved in the illicit trafficking of narcotics were as follows:

- (a) key chain with a single key in the ignition of the truck;
- (b) Visine near the driver;
- (c) fast food wrapper from McDonald's on the floor;
- (d) no bag or suitcase of clothes visible;
- (e) strong and fresh odour of perfume.

[70] Cst. Unger testified that he had been taught the following with respect to each of these indicators:

- (a) Most people have more than one key on a key chain. A single key on a chain may be an indicator that the driver is distant from the owner of the vehicle;
- (b) Visine is used to get rid of blood shot eyes which can be an indicator of someone who uses illicit narcotics;
- (c) People who are moving quantities of narcotics do not want to make frequent or long stops because of the need to transport the drugs to get where they are going quickly and minimize the time during which they could be stopped by the police or ripped off;

- (d) For the same reason, individuals who are traveling quickly without stops do not have clothes or a suitcase; and
- (e) Perfume can be sprayed to try and mask the chemical smell of marijuana or narcotics.

[71] Ms. Schmitz testified with respect to each of these indicators:

- (a) She has always kept her vehicle key separate from her other keys;
- (b) She has had eye surgery and requires eye drops; she is allergic to birch trees and needs Visine for allergies;
- (c) There is no McDonald's or A & W in Hay River. When she is down south, she brings back fast food from McDonald's, A & W and Kentucky Fried Chicken for her son and his friends;
- (d) She had an overnight bag behind her truck seat and a suitcase in the truck bed; and
- (e) She uses body spray on a regular basis to freshen up.

[72] In my view, the observations made by Cst. Unger had little, if any, probative value to his investigation. As indicated by Ms. Schmitz, the trip from Devon, Alberta to Hay River is normally between 10 ½ or 11 ½ hours in duration. Given the isolation of Hay River and the distance to major centres in the south, it would not be unusual for people who are not involved in the transportation of illicit drugs to drive that distance in a day and try to do it as quickly as possible. The use of Visine and body spray is consistent with an innocent use.

[73] With respect to the analysis of whether or not Cst. Unger had reasonable suspicion for the investigative detention and the sniffer dog search, these observations would not have increased the grounds for the reasonable suspicion; however, they would not have diminished or disproved the suspicion which he already had.

[74] At the point of the investigative detention, Cst. Unger still had grounds for a reasonable suspicion that Ms. Schmitz was transporting marijuana, given the information from the informant and the confirmation of some of the information.

D.3 The Traffic Stop

[75] The testimony of Cst. Butt and Cst. Unger indicates that they intended to stop Ms. Schmitz' pickup truck regardless of whether it was speeding or not.

Although I accept that the primary purpose of the traffic stop was a drug investigation, I find that Ms. Schmitz was speeding. Although this finding may not have a great deal of legal significance, I feel obliged to explain my reasoning, given the time that the defence spent on this issue.

[76] Although Cst. Unger was on patrol on his day off, specifically in response to the information involving Ms. Schmitz, Cst. Butt testified that he was not scheduled to work but because of the large amount of traffic back on the roadway, elected to come into work on that date. In other words, unlike Cst. Unger, Cst. Butt's primary reason for being at work on June 2, 2013 was not to investigate the information involving Ms. Schmitz.

[77] Cst. Butt testified that he determined the speed of Ms. Schmitz's truck using his radar unit to be 102 kilometers an hour. He was travelling southbound. Her truck was travelling northbound. Cst. Butt does not remember other vehicles being around. He does not remember anything about a semi-trailer truck.

[78] Cst. Unger acknowledges that there was a semi-trailer truck in front of the pickup truck:

Q: So the conversation between you and Constable Butt went, I suggest, this way, in terms of radio communication: "There she is behind the semi." This was the first utterance about Michelle Schmitz, wasn't it?

A: I don't recall if I could confirm that that was her. I said I observed a vehicle, it matched the description, I didn't get the plate, behind the semi.

[79] The defence suggests that Cst. Butt did not have the radar reading for Ms. Schmitz but must have had the radar reading for the semi-trailer truck. The reason for this submission is that Ms. Schmitz said she was using the cruise control. In this regard, Ms. Schmitz testified:

Q: So you were saying that the semi accelerated and you accelerated as well?

A: Yes.

...

A: So the semi is ahead of me, I'm behind the semi, and I'm wanting to pass the semi, but I'm not. I have my cruise control on. I looked to the left lane, so not to use my hand, but the semi's here, I'm behind it, and so you need to check your lane to make sure you're safe to pass, and that's when the police RCMP car, which Mr. Butt was driving, was already turning and had its lights on.

...

A: I was going 90, and I was sure -- I know I was going 90, I had my cruise control on, and the semi was ahead of me. So I wasn't catching up to him, so he was going faster than I was, because we had left the same rest stop at the same time.

[80] I do not doubt the accuracy of the radar reading by Cst. Butt. There is nothing in his evidence to indicate that the radar confused the semi-trailer with Ms.

Schmitz' truck. On the other hand, I have some difficulty with the evidence of Ms. Schmitz regarding her certainty that she was travelling at 90 kph. The cruise control does not limit the speed of the vehicle if Ms. Schmitz was accelerating after a stop. Ms. Schmitz testified that when she and the semi pulled out from the roadside, both she and the semi were accelerating. She clearly said that she was trying to position herself to pass the semi. To do so would have her accelerating to match and then surpass the speed of the semi. Even if the radar picked up the speed of the semi, which I find not to be true, her speed would be equal to or in excess of that speed.

[81] I accept that Ms. Schmitz' truck was travelling at 102 kph when Cst. Butt used his radar unit to determine the speed of the vehicle.

D.4 The Duration of the Investigative Detention

[82] Ms. Schmitz was detained approximately 1 ½ hours from the initial vehicle stop at 4:41 p.m. until 6:07 p.m., when she was arrested after the drugs were located. Part of this time included waiting for the sniffer dog to be brought from Hay River to the location of the vehicle stop. Accepting that an investigative detention "should be brief in duration," was Ms. Schmitz's detention unacceptably long?

[83] In my view, the answer is no for two reasons. First, there does not appear to have been any unnecessary delays in contacting Cpl. Stebanuk, bringing the sniffer dog to the location of the vehicle stop, conducting the sniff search and then conducting the vehicle search. Second, any alternative procedures would have taken just as much time.

D.5 The Sniffer Dog Search

[84] As indicated earlier, a sniffer dog search is *Charter*-compliant if there is a reasonable suspicion based on objective, ascertainable facts that evidence of an offence will be discovered and the search is conducted reasonably.

[85] My basis for finding that there was a reasonable suspicion was discussed earlier in this decision. During the *voir dire*, counsel for Ms. Schmitz accepted that Sherlock was properly trained and handled.

[86] Therefore, I find that the sniffer dog search was *Charter*-compliant.

D.6 Arrest after the Positive Indication by the Sniffer Dog

[87] After the sniffer dog indicated a positive result, Cst. Unger felt he had reasonable and probable grounds to arrest Ms. Schmitz. He testified that, to his understanding at the time, the truck was being searched incidental to the arrest of Ms. Schmitz. The search of the truck was a search without a warrant. A search without a warrant is lawful if it is incidental to arrest. The difficulty in this case is that the Crown has failed to prove that Ms. Schmitz was arrested after the sniffer dog indicated the presence of drugs. In other words, Ms. Schmitz' truck was searched *before* her arrest not *after* her arrest.

[88] The notes of Cst. Unger do not state that he arrested her or that he gave Ms. Schmitz her rights to counsel after the sniffer dog indicated the presence of drugs. Cst. Unger testified that he thinks that he arrested Ms. Schmitz but cannot be sure. He accepted, under cross-examination that "You may have arrested her at that time, but you can't remember." Cst. Unger testified that as a result of the positive indication by the police dog, he was excited to start on the search. This may account for the non-existence of notes regarding an arrest, *Charter* rights and caution. It is up to the Crown to prove that Ms. Schmitz was arrested after the sniffer dog search. Given the evidence of Cst. Unger, the Crown has not done so.

[89] If Cst. Unger did not arrest Ms. Schmitz, the subsequent search of the truck was not done as a search incidental to an arrest made before the search took place. What then is the lawful authority, if any, for the search?

[90] The Alberta Court of Queen's Bench dealt with a similar situation in *R. v. Nguyen*, [2008] A.J. No. 1361. In *Nguyen*, there were reasonable grounds for an arrest but an arrest was not made before a search of a cell phone box in a vehicle revealed cocaine. In *R. v. Nguyen*, Justice Graesser relied on *R. v. Debot* (1986), 17 O.A.C. 141, upheld [1989] 2 S.C.R. 1140; *R. v. Sinclair*, 2005 MBCA 41, 64 W.C.B. (2d) 563, leave denied [2005] S.C.C.A. No. 263; and *R. v. Parchment*, 2007 BCCA 326, 74 W.C.B. (2d) 6 for the proposition that where an officer has reasonable and probable grounds to arrest a person, the officer may search the person prior to arrest if the search is incidental to arrest. In particular, in *Debot*, the Ontario Court of Appeal stated at page 225:

What constitutes a search incident to arrest is a question of law ... I do not think that the fact that the respondent would not have been arrested if drugs had not been found in his possession, precludes the prior search from being incidental to the arrest that followed the finding of the drug. This is provided, always, that the officer had reasonable grounds, prior to the search, for arresting the respondent under s. 450 of the Code.

[91] And in *R. v. Greffe* [1990] 1 S.C.R. 755; at paragraph 7:

... If reasonable and probable grounds for an arrest prior to the search existed, then that search is legal in terms of s. 450 of the *Criminal Code*, despite the fact that the accused was not charged with possession of narcotics at the time ...

[92] The Supreme Court in the Northwest Territories has adopted the proposition in *Debot*. In *R. v. Whalen*, [2006] N.W.T.J. No. 39, Justice Vertes stated:

42 While the issue of search incident to arrest was not first and foremost in *Debot*, numerous cases have nevertheless cited the Court of Appeal decision to support the proposition that a search may occur before or after formal arrest so long as the grounds for the arrest exist prior to the search: see, for example, *R. v. McComber* (1988), 44 C.C.C. (3d) 241 (Ont. C.A.); *R. v. Arason* (1992), 78 C.C.C. (3d) 1 (B.C.C.A.); *R. v. Lam* (2003), 178 C.C.C. (3d) 59 (Alta. C.A.). I know of no authority that has disavowed that proposition.

[93] At the point where the police dog indicated positive for drugs, the police had reasonable and probable grounds to believe that she was transporting marijuana. This gave the police the authority to arrest Ms. Schmitz for the possession of marijuana. That Cst. Unger did not arrest her prior to the search does not prevent the search from being incident to an arrest. As stated in *Whalen*:

44 In my opinion, reasonable and probable grounds existed for arresting the accused apart from the results of the search. The results of the search were not used to justify the arrest. The grounds for arrest pre-existed the search. The formal arrest immediately followed the search. Thus the requirements outlined in *Debot* for a search incident to arrest were met.

D.7 Introduction to Oral Statements to Cst. Unger

[94] As indicated earlier in these reasons, I have dealt with the *voir dire* involving the accused's warned and video-taped statement to the police already. I found that the statement was given voluntarily and was admissible at trial. Defence seeks to have oral statements made by Ms. Schmitz to Cst. Unger excluded. In particular, counsel for the accused submits that the statement that Ms. Schmitz gave in response to Cst. Unger's question, "Where are you coming from?" and her comments to him in the police vehicle on the drive to the Hay River detachment should be excluded since they were in breach of sections 10(a) and 10(b) of the *Charter*. For the reasons that follow, I agree with these submissions.

D.8 Where are you coming from?

[95] Cst. Unger and Cst. Butt went out on Highway #1 with the intention of finding the pickup truck that was the subject matter of the informant's tip. They were going to stop the truck for the purposes of a drug investigation. When the

truck was located, it was speeding and Cst. Butt pulled it over. He was writing a speeding ticket when Cst. Unger arrived.

[96] When Cst. Unger approached on the passenger side, in his mind, the truck was not going anywhere and Michelle Schmitz was detained for the purposes of the drug investigation. He should have informed her that she was detained for this purpose. Instead, according to his testimony, he asked her where she was coming from. He testified that he asked her this for two reasons: (a) because he usually asks it on a traffic stop to see if the driver could be fatigued; and (b) to confirm the information from the confidential human source. She said she was coming from Calgary and had been on some sort of course.

[97] Ms. Schmitz testified that Cst. Unger asked where she was coming from. She told Cst. Unger that she was coming from Calgary and had been a course at the university all week. He asked if she did some shopping. She told him that the truck box was full of bedding plants. She said she was taking a workshop and had the certificate in the truck if he wanted to see it.

[98] Cst. Unger testified that he used this conversation to confirm the information given by the confidential source, i.e., that the vehicle was coming from Alberta.

[99] Ms. Schmitz should have been told why she was detained and given her right to counsel immediately before being asked any questions by Cst. Unger. There was a breach of her rights under sections 10(a) and 10(b) of the *Charter*.

D.9 Eliciting Responses after Request to Speak to Legal Counsel

[100] Cst. Unger did arrest Ms. Schmitz at 18h07 after the search of the truck and the discovery of the marijuana. In response to receiving her right to counsel, Ms. Schmitz said that she wished to speak to a lawyer. Ms. Schmitz was unable to exercise her right to counsel until she was at the RCMP detachment in Hay River. On the drive back to Hay River, during the “hold off period”, Cst. Unger testified that the following conversation took place:

It was basically trying to distance herself from what we found. It was like a well, I don't know what you found, but I can guess, and then I respond to those comments by just saying well, I said you need a key to get access to that, the area of the vehicle, and Ms. Schmitz had stated that she had lost the key . . . Ms. Schmitz I think had a feeling that someone had given information that led us to stopping her. So she was asking questions about that, and then again just trying to distance herself from what was found, and again, I made comments like well, people don't send up marijuana in a vehicle that they don't know. I wouldn't – I don't know how – again, I don't know the exact street value of the amount that was found, but you wouldn't just hide that in a strange vehicle and hope that it gets to where it's going.

[101] In cross-examination, Cst. Unger testified that he said to Ms. Schmitz that the marijuana must have “miraculously got there” and that “you need a key to access that [the area where the spare tire was].”

[102] In the period between when Ms. Schmitz requested to speak to a lawyer and when she was given the opportunity to speak to a lawyer, Cst. Unger was under a duty to not engage in any conduct that would elicit statements regarding the offence from Ms. Schmitz. I find that Cst. Unger’s comments to the effect that you need a key to access the spare tire; that people wouldn’t just put drugs in spare tire of a truck hoping they would be there when the truck got there and that the drugs would not miraculously get there are comments given to elicit a response.

[103] The words uttered by Ms. Schmitz in the patrol car on the trip between km 52 and the Hay River detachment were elicited in breach of section 10(b) of the *Charter*.

E. SHOULD EVIDENCE BE EXCLUDED UNDER S. 24(2)

E.1 Section 24(2) Analysis

[104] For the reasons given above, I have found that there was a breach of sections 10(a) and 10(b) of the *Charter* with respect to Ms. Schmitz’ words:

in response to Cst. Unger asking, “where are you coming from?”
when he first approached her truck at km 52;

and a breach of section 10(b) of the *Charter* with respect to Ms. Schmitz’s words:

in response to Cst. Unger’s comments to Ms. Schmitz on the trip
between km 52 and the Hay River RCMP detachment.

[105] Once a breach has been established, the onus is on the accused to show that the evidence obtained should be excluded under section 24(2).

[106] Section 24(2) of the *Charter* 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 the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[107] The approach to be taken by the Court when dealing with an application to exclude evidence under s. 24(2) was set out by the Supreme Court of Canada in paragraph 71 of *R. v. Grant* (2009), 245 C.C.C. (3d) 1 (S.C.C.):

... When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute ...

The seriousness of the *Charter*-infringing state conduct

[108] As stated in *Grant, supra*, at paragraph 72, "The more severe or deliberate the state conduct that led to the *Charter* violation, the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law."

[109] Justice Doherty in *R. v. Kitaitchik*, [2002] O.J. No. 2476 (Ont. C.A.) described a spectrum of police conduct at paragraph 41:

Police conduct can run the gamut from blameless conduct, through negligent conduct, to conduct demonstrating a blatant disregard for Charter rights . . . What is important is the proper placement of the police conduct along that fault line, not the legal label attached to the conduct. [citations omitted from paragraph]

[110] Although the police conduct was serious, it was not deliberate. Cst. Unger was confused about grounds for reasonable suspicion. On the other hand, he was also aware that the traffic stop based on the speeding of the Schmitz truck was not the real reason for the stop. He should have told her the reason for the stop at the earliest opportunity. He was aware of that. Similarly, he should not have engaged in the conversation with Ms. Schmitz on the ride to the Hay River. These are basic policing concepts which are settled law fundamental to the *Charter*. They should be known by every police officer.

The impact of the breach on the *Charter*-protected interests of the accused

[111] The right to silence and the right to choose whether or not to speak to authorities are important *Charter*-protected interests. The impact of the breach of the right of the accused to know her true legal liability, the right to counsel and then the right to exercise her right to counsel before being asked questions is serious.

Society's interest in the adjudication of the case on its merits

[112] The Supreme Court of Canada in *Grant, supra* at paragraph 79 stated that “Society generally expects that a criminal allegation will be adjudicated on its merits. Accordingly, the third line of inquiry . . . asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion.”

[113] The statement by Ms. Schmitz that she was coming from Alberta is not of importance to this case, given the other indicia of where she was coming from. Her words with respect to having lost a key to the truck may have some significance in certain contexts; however, they do not appear to be important to the adjudication of this case.

[114] The statements by Ms. Schmitz to which I have referred are excluded.

F. CONCLUSION

[115] For the reasons indicated, I find that the stop of the truck driven by Michelle Schmitz and her subsequent detention were lawful and not an arbitrary detention. The open air search by the sniffer dog and the vehicle search by the RCMP officers were lawful and not in breach of section 8 of the *Charter*.

[116] Therefore the 960.3 grams of cannabis marijuana as described in Cst. Unger and the Certificates of Analyst which were made Court exhibit 3 are admitted as evidence.

[117] The words spoken by Michelle Schmitz in response to Cst. Unger when he first approached the pickup truck and prior to his detention of her are excluded as are any statements given by her in Cst. Unger's police vehicle on the drive from km 52 to the Hay River RCMP detachment.

Garth Malakoe
T.C.J.

Dated at Yellowknife, Northwest
Territories, this 18th day of
December, 2014.

R. v. Michelle Charlotte Schmitz, 2014 NWTTC 28

Date: 2014 12 18

File: T2-CR-2013-000391

**IN THE TERRITORIAL COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN:

HER MAJESTY THE QUEEN

- and -

MICHELLE CHARLOTTE SCHMITZ

**REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE**

Ruling on *voir dire* on admissibility of evidence
[Sections 4(4) and 5(4) of the *Controlled Drugs and
Substances Act*]