# R. v. Aitahmed, 2022 NWTTC 01

# Date: 2022 01 21

# File: T-1-CR-2021-001002

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

 **BETWEEN:**

## **AZIZ AITAHMED**

Applicant

**- and -**

**HER MAJESTY THE QUEEN**

Respondent

**REASONS FOR DECISION**

**of the**

**HONOURABLE JUDGE GARTH MALAKOE**

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| Heard at: |  | Yellowknife, Northwest Territories |
|  |  |  |
| Date of Decision: |  | January 21, 2022 |
|  |  |  |
| Date of Hearing: |  | December 16, 2021 |
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| Counsel for the Applicant: |  | Jessi Casebeer |
|  |  |  |
| Counsel for the Respondent |  | Madison Walls and Trevor Johnson |
|  |  |  |
| Counsel for the RCMP |  | Chris Bernier |

 [*O’Connor* Application for Disclosure of RCMP Policy]

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1. INTRODUCTION
	1. Issue
		1. In the early morning hours of May 1, 2021, the Applicant, Aziz Aitahmed was arrested in Yellowknife by the Royal Canadian Mounted Police (RCMP) for using a BB pellet gun to commit an assault on two individuals and for carrying the BB pellet gun. Mr. Aitahmed was placed in a cell at about 02h30 and released from the cell at 09h54, approximately 7½ hours later. He was released from police custody on an undertaking to the police with conditions pursuant to s. 498(1)(c) of the *Criminal Code.*
		2. Mr. Aitahmed has entered “not guilty” pleas to five charges, including the three noted above. His trial will begin later in the year. The defence has stated its intention to file a *Charter* application seeking a stay of proceedings. It is alleged that Mr. Aitahmed was arbitrarily detained contrary to s. 9 of the *Charter* because he was not released as soon as applicable pursuant to s. 498 of the *Criminal Code*.
		3. It is accepted by all counsel, including the counsel for the RCMP, that an RCMP policy regarding the release of individuals pursuant to s. 498 of the *Criminal Code* (the “RCMP Release Policy”) exists. The Applicant seeks disclosure of this policy. The Crown and RCMP oppose the application, primarily on the basis that the Applicant has not established the evidentiary basis for the relevance of the RCMP Release Policy to the trial of the Applicant.
		4. At the hearing, all counsel agreed that this Court’s analysis of the application is governed by the principles in *R. v. O’Connor*, [1995] 4 S.C.R. 411 and hence this application for disclosure of the RCMP Release Policy is referred to as an *O’Connor* Application.
		5. In this decision, any reference to a section number in the absence of the name of the legislation is a reference to the *Criminal Code*, R.S.C. 1985, c. C-46, as amended.
2. OVERVIEW OF THE LAW FOR DISCLOSURE OF THIRD PARTY RECORDS
	1. Disclosure of First Party Records
		1. Where an accused person is charged with a criminal offence, the accused is entitled to disclosure of all the non-privileged information that the Crown possesses which will be used to prove the case against the accused, which could assist the accused’s defence or which could otherwise assist the defence in making a decision about the conduct of the case. This requirement to disclose “first party records” was set out in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. This entitlement to disclosure is a constitutional right as described in *R. v. Dixon*, [1998] 1 S.C.R. 244:

22 The obligation resting upon the Crown to disclose material gives rise to a corresponding constitutional right of the accused to the disclosure of all material which meets the *Stinchcombe* threshold. As Sopinka J. recently wrote for the majority of this Court in *R. v. Carosella*, [1997] 1 S.C.R. 80, at p. 106:

The right to disclosure of material which meets the *Stinchcombe* threshold is one of the components of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the *Charter*. Breach of that obligation is a breach of the accused’s constitutional rights without the requirement of an additional showing of prejudice.

Thus, where an accused demonstrates a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence, he has also established the impairment of his *Charter* right to disclosure.

* + 1. How do these first party records get into the hands of the Crown? The Crown receives information from the police which is the result of the investigation of the accused by the police. The police have a duty to provide all information which pertains to the investigation of the accused to the Crown. Conversely, the Crown has a duty to inquire of the police to obtain relevant information which the police has in its possession but which has not yet been disclosed to the Crown. As stated in *R. v. Gubbins*, [2018] S.C.J. No. 44:

21 In *McNeil*, this Court clarified that “the Crown cannot explain a failure to disclose relevant material on the basis that the investigating police force failed to disclose it to the Crown”: para. 24. The Crown has a duty to make reasonable inquiries when put on notice of material in the hands of police or other Crown entities that is potentially relevant: *McNeil*, at para. 49. As well, the police have a corresponding duty to disclose “all material pertaining to its investigation of the accused”: *McNeil*, at paras. 23 and 52. Such material is often referred to as “the fruits of the investigation”: *McNeil*, at paras. 14, 22-23.

* + 1. The disclosure obligation of the police goes beyond what is obtained as a result of the investigation. Police must also disclose to the Crown any additional information that is “obviously relevant” to the accused’s case. *R. v. Gubbins*, *supra*:

23 In addition to information contained in the investigative file, the police should disclose to the prosecuting Crown any additional information that is “obviously relevant” to the accused’s case. The phrase “obviously relevant” should not be taken as indicating a new standard or degree of relevance: *Jackson*, at para. 125, per Watt. J.A. Rather, this phrase simply describes information that is not within the investigative file, but that would nonetheless be required to be disclosed under *Stinchcombe* because it relates to the accused’s ability to meet the Crown’s case, raise a defence, or otherwise consider the conduct of the defence. *McNeil* requires the police to hand such information to the Crown.

* 1. Third Party Records
		1. Even if the police fulfills its obligation to provide the information in the investigative file and other “obviously relevant” information to the Crown, the Crown might not be in possession of all the information that is relevant to an accused’s case and therefore, will not be in a position to disclose this information to the accused. This information can already be in the possession of the accused or it can be in the possession of a third party, i.e., not the accused and not the Crown. Examples of third party records include records of a medical professional treating the complainant, disciplinary records of police officers involved in the investigation, the diary of the complainant, or, as in this case, a policy governing the behaviour of police officers.
		2. With respect to first party and third party records involving criminal offences of a sexual nature, there are provisions in the *Criminal Code* which prescribe the procedure and criteria for disclosure of these records. Such provisions balance the privacy interest of the complainant in these records and the relevancy of the records to the case involving the accused. These *Criminal Code* provisions do not apply to this application.
		3. With respect to third party records not covered by the provisions in the *Criminal Code*, the Supreme Court of Canada in *O’Connor* has established a procedure which permits the accused to apply for disclosure of these records. The *O’Connor* procedures allows the accused to summons the third party record holder to Court with the records. Submissions are made with respect to the relevancy of the records to the accused’s case. The accused must establish that the records are “likely relevant”. The judge then decides whether or not to review the records. If the judge reviews the records, he or she will then decide which, if any, portions of the records can be disclosed to the defence. This procedure was summarized in *R. v. Gubbins*, *supra*:

25 Third party disclosure is dealt with in *O’Connor*. To obtain disclosure of such records, an accused must make a court application. First, the burden is on the accused to show that the record is “likely relevant”. Second, where the accused discharges this burden, the judge will examine the record to determine whether, and to what extent, it should be produced to the accused.

* 1. Distinction Between First Party and Third Party Records
		1. When the third party record holder is the RCMP and the RCMP also has a duty to disclose to the Crown all evidence relevant to the accused’s case, there may be a question as to whether the RCMP is obliged to disclose the information as part of its duty of first party record disclosure to the Crown or whether the evidence is a third party record, which is outside of this primary disclosure obligation. The distinction between first party records and third party records is summarized in *R. v. McNeil*, [2009] 1 S.C.R. 66:

33 Based on the previous discussion of disclosure regimes, to determine which regime is applicable, one should consider: (1) Is the information that is sought in the possession or control of the prosecuting Crown? and (2) Is the nature of the information sought such that the police or another Crown entity in possession or control of the information ought to have supplied it to the prosecuting Crown? This will be the case if the information can be qualified as being part of the “fruits of the investigation” or “obviously relevant”. An affirmative answer to either of these questions will call for the application of the first party disclosure regime.1 Otherwise, the third party disclosure regime applies.

1 Out of an abundance of caution, nothing in these reasons should be seen as detracting from the *Mills* regime which requires an application to obtain records “relating to a complainant or a witness” even if those records are in the possession or control of the Crown: see *Criminal Code*, ss. 278.1-278.9; *R. v. Mills*, [1999] 3 S.C.R. 668.

* + 1. Thus, the distinction between first party and third party records is as follows. All information which is gathered as part of the investigation into the accused (the “fruits of the investigation”) or which is “obviously relevant” to the case against the accused has to be disclosed by the police to the Crown and forms part of the first party disclosure regime. The only way that the Crown can refuse disclosure of first party records is if the Crown can establish that the information is “clearly irrelevant.” Other records which exist and which are not part of the investigation are considered to be third party records. Disclosure of these third party records require the accused to show that they are “likely relevant” to the defence case. In this application, the RCMP Release Policy is a third party record.
	1. Disclosure of Third Party Records
		1. The procedure to be followed on an *O’Connor* application is summarized in *R. v. McNeil*, *supra*:

27 Stated briefly, the procedure to be followed on an *O’Connor* application is the following:

(1) The accused first obtains a *subpoena duces tecum* under ss. 698(1) and 700(1) of the *Criminal Code* and serves it on the third party record holder. The subpoena compels the person to whom it is directed to attend court with the targeted records or materials.

(2) The accused also brings an application, supported by appropriate affidavit evidence, showing that the records sought are likely to be relevant in his or her trial. Notice of the application is given to the prosecuting Crown, the person who is the subject of the records and any other person who may have a privacy interest in the records targeted for production.

(3) The *O’Connor* application is brought before the judge seized with the trial, although it may be heard before the trial commences. If production is unopposed, of course, the application for production becomes moot and there is no need for a hearing.

(4) If the record holder or some other interested person advances a well-founded claim that the targeted documents are privileged, in all but the rarest cases where the accused’s innocence is at stake, the existence of privilege will effectively bar the accused’s application for production of the targeted documents, regardless of their relevance. Issues of privilege are therefore best resolved at the outset of the *O’Connor* process.

(5) Where privilege is not in question, the judge determines whether production should be compelled in accordance with the two-stage test established in O’Connor. At the first stage, if satisfied that the record is likely relevant to the proceeding against the accused, the judge may order production of the record for the court’s inspection. At the next stage, with the records in hand, the judge determines whether, and to what extent, production should be ordered to the accused.

* + 1. The meaning of “likely relevant” is explained in *R. v. Gubbins*, *supra*:

26 Information will be “likely relevant” where there is “a reasonable possibility that the information is logically probative to an issue at trial or to the competence of a witness to testify”: *O’Connor*, at para. 22 (emphasis deleted). The “likely relevant” threshold has been described as significant, but not onerous: *O’Connor*, at para. 24; *McNeil*, at para. 29. The reason that the relevance threshold is “significant” is to allow the courts to act as gatekeepers, preventing “speculative, fanciful, disruptive, unmeritorious, obstructive, and time consuming” requests for production: *O’Connor*, at para. 24, quoting *R. v. Chaplin*, [1995] 1 S.C.R. 727, at para. 32.

* + 1. It is clear that these two different regimes as set out in *Stinchcombe* and *O’Connor* cover all first party and third party disclosure. *R. v. Gubbins, supra*:

29 To summarize, two different regimes govern disclosure in criminal cases. First party disclosure, as set out in *Stinchcombe* and supplemented by the duties on the Crown and the investigating police in *McNeil*, requires disclosure of all relevant information upon request. If the Crown refuses disclosure, it bears the burden to show that the information is “clearly irrelevant”. Third party disclosure per *O’Connor* requires an application to the court for third party disclosure (where the records sought do not fall under first party disclosure) for which the defence bears the burden to show that the record is “likely relevant”. In both instances, the purpose is “[to protect] an accused person’s right to make full answer and defence, while at the same time recognizing the need to place limits on disclosure when required”: *World Bank Group v. Wallace*, 2016 SCC 15, [2016] 1 S.C.R. 207, at para. 115. Such limits include avoiding fishing expeditions.

* + 1. Ultimately, the regime in *O’Connor* is intended to provide a balance between the right of the accused to make full answer and defence, any privacy interests of a third party in the third party records and the efficiency of the trial system. This balancing was described by Madam Justice McLachlin, as she then was, in *O’Connor*:

194 Perfect justice in the eyes of the accused might suggest that an accused person should be shown every scintilla of information which might possibly be useful to his defence. From the accused’s perspective, the catalogue would include not only information touching on the events at issue, but anything that might conceivably be used in cross-examination to discredit or shake a Crown witness. When other perspectives are considered, however, the picture changes. The need for a system of justice which is workable, affordable and expeditious; the danger of diverting the jury from the true issues; and the privacy interests of those who find themselves caught up in the justice system -- all these point to a more realistic standard of disclosure consistent with fundamental fairness. That, and nothing more, is what the law requires.

195 I believe the test proposed by L'Heureux-Dubé J. strikes the appropriate balance between the desire of the accused for complete disclosure from everyone of everything that could conceivably be helpful to his defence, on the one hand, and the constraints imposed by the trial process and privacy interests of third parties who find themselves caught up in the justice system, on the other, all without compromising the constitutional guarantee of a trial which is fundamentally fair.

1. APPLICATION OF THE PRINCIPLES IN *O’CONNOR*
	1. The Procedure
		1. The Applicant filed its application for disclosure of the RCMP Release Policy on December 3, 2021. Although there was no *subpoena duces tecum* issued for an RCMP representative to bring a copy of the policy to Court, the RCMP were represented by counsel at the hearing of the application. Counsel for the RCMP indicated that if the Court ordered production of the record for the Court’s inspection, it would provide the RCMP Release Policy with proposed redactions, if necessary.
		2. Counsel for the Crown and the Applicant agreed that when this matter comes to trial, the trial and the *Charter* application would be conducted as a blended *voir dire* with all evidence called during the *voir dire* being applied to the trial.
	2. Likely Relevance
		1. The Applicant argues that the RCMP Release Policy is relevant to two issues. First, whether or not there was an arbitrary detention and second, if there was an arbitrary detention, whether the appropriate remedy is a stay of proceeding.
		2. With respect to the first issue, the police officers who were responsible for the 7½ hour detention would be cross-examined on their knowledge of and their adherence to the RCMP Release Policy in the context of determining whether the Applicant was detained for a *Charter* compliant period of time. The Applicant asserts that on the face of it, a 7 ½ hour detention prior to release should raise a red flag with respect to *Charter* compliancy.
		3. With respect to the second issue, the seriousness of the *Charter* breach would be affected by whether the officers knew of the policy, whether the officers followed the policy and whether the content of the policy itself complied with the *Charter*.
		4. In response, with respect to the first issue, the Crown and the RCMP argue that whether or not the RCMP officers were aware of and whether or not they followed the RCMP Release Policy is of no relevance to the issue of whether or not there was an arbitrary detention.
		5. With respect to the appropriate remedy for a *Charter* breach, they argue that the application for disclosure of the RCMP Release Policy is premature since the breach has not been established.
	3. Is the RCMP Release Policy likely relevant to whether there was a breach?
		1. To restate the test in *Gubbins* dealing with “likely relevant”, is there a “reasonable possibility” that a policy which deals with the factors to be considered when releasing an accused under s. 498 “is logically probative to an issue at trial or to the competence of a witness to testify?” Certainly, the subject matter of the issue at trial and of the policy appears to be the same, i.e., the release of the accused where there is no bail hearing.
		2. At this point in the proceedings, the Court knows little about what is contained in the RCMP Release Policy, except that it is a policy “addressing the release of accused persons not held for a bail hearing” to use the words in the affidavit in support of this application. Based on what is before the Court, the RCMP Release Policy applies directly to the Applicant in the circumstances of his arrest and release. In this regard, it would be analogous to a checklist being used by police officers in deciding on the release of the accused.
		3. The Crown and RCMP argue that the Court has to decide whether the accused was held in cells too long and whether there was a *Charter* breach. Whether or not the policy is *Charter* compliant and whether or not the police officers followed it is not probative to that question. This logic was explained in *R. v. Pangman*, 2000 MBQB 96, where the Court found certain police policies irrelevant:

Evidence of policies, procedures and practices generally, whether of the Winnipeg Police Service or of other police forces, is irrelevant and inadmissible to the establishing of the fact of the breach. If the policies were offensive to the *Charter* but the conduct of the officers complied with the *Charter,* there would be no breach of the *Charter* made out. If the policies were a model of *Charter* respect but the conduct of the officers offended the *Charter* rights of the accused, then the breach will be made out.

* + 1. In *Pangman*, the accused was seeking a variety of policies from various police forces to establish how they deal with racial minorities with the intent of calling expert evidence about them. This differs conceptually from a RCMP policy which is meant to apply to all accused, including the one before the Court, who are being released under s. 498.
		2. In examining a police officer about why he or she made certain decisions regarding the release of an accused, it is likely relevant to ask questions about a policy which is intended to govern that officer’s decision-making in that specific situation. In the end, this may not be probative of whether the decision was *Charter* compliant, however, it is likely relevant to the decision-making process of the officer and his or her credibility or reliability in that regard.
		3. As Justice Simonsen stated in *R. v. Horzempa,* 2005 MBQB 282,

23. . . . As well, if the officer unknowingly did not follow policy, this may affect the reliability of his evidence. If he knowingly did not follow policy, this may affect the credibility of his evidence. Surely then the policy is relevant under the low threshold prescribed by *Stinchcombe*.

* + 1. It needs to be restated that the Court is at the first stage of the two stage process in *O’Connor.* In determining whether or not the RCMP Release Policy is likely relevant or not, the Court is acting as a gatekeeper to prevent “speculative, fanciful, disruptive, unmeritorious, obstructive, and time consuming” requests for production or as others have said, to prevent fishing expeditions.
		2. Recognizing that the Court is at this first stage is important in addressing the assertion by the Crown and the RCMP that there is no evidentiary basis to the application. The threshold of “likely relevance” recognizes that the Applicant and the Court do not have the third party record, in this case, the RCMP Release Policy in their possession. Nor have we seen it. The foundation for an assertion of “likely relevance” relies on certain assumptions as to what is contained in an RCMP policy “addressing the release of accused persons not held for a bail hearing.” As I stated earlier, it is reasonable to infer that the RCMP Release Policy applies directly to the circumstances of the Applicant.
		3. Without having read the RCMP Release Policy, we do not know its degree of specificity; nor do we know to whom it is addressed within the RCMP. In my view, these questions can be answered once the Court has been provided with the policy. As stated in *McNeil*, with respect to the first stage in *O’Connor*:

33. . . . At this stage of the proceedings, the court cannot insist on a demonstration of the precise manner in which the targeted documents could be used at trial. The imposition of such a stringent threshold burden would put the accused, who has not seen the documents, in an impossible Catch-22 position.

* 1. Is the RCMP Release Policy likely relevant to the remedy for the breach?
		1. If the Court finds that there has been a breach of the *Charter,* the Applicant has indicated that he will be seeking a stay of proceedings. The issue of “overholding” in police cells and the appropriate remedy has been dealt with in a number of cases including *R. v. Shin*, [2019] O.J. No. 2395. What is clear from these cases is that “state conduct” is a factor in determining the appropriate remedy. In this regard, whether or not the police officers followed the RCMP Release Policy and whether the RCMP Release Policy was *Charter* compliant is relevant in the event that this Court finds that there was a *Charter* breach.
		2. The argument regarding the lack of evidentiary basis also relates to the likely relevance of the RCMP Release Policy to the determination of a remedy in the event that the Court finds that there was a *Charter* breach. Simply put, the Crown and the RCMP argue that it is premature for the Court to determine whether or not the RCMP Release Policy is likely relevant to a remedy because no *Charter* breach has been established. There is a danger that if the Court discloses the RCMP Release Policy on the basis of its likely relevance in the future, it will be used for an irrelevant purpose during the trial before then.
		3. I do not fault the Applicant for bringing this application in advance of the trial. Had the “likely relevance” of the RCMP Release Policy been only with respect to its use in determining a remedy, I may have adjourned the application until after I had determined whether or not there was a *Charter* breach. Given my finding that the RCMP Release Policy is likely relevant during the *voir dire* related to the *Charter* application, there is no need to adjourn it. On the other hand, if after inspection of the RCMP Release Policy, the Court finds that the RCMP Release Policy is only relevant to the remedy, then its production to the Applicant may have to be delayed.
	2. Reasonable Expectation of Privacy
		1. In its written decisions, the Applicant relied primarily on the case of *R. v. Horzempa*, *supra*. In particular, *Horzempa* appeared to state that the *O’Connor* regime was only applicable where there was a reasonable expectation of privacy in the third party records. In *Horzempa*, the Court found that an institutional entity such as a police force does not have privacy interests and therefore, there was no reasonable expectation of privacy in a police policy. The Court in *Horzempa* found, therefore, that the methodology set out in *O’Connor* did not apply.
		2. When counsel for the Applicant, the RCMP and the Crown provided their oral arguments, there was agreement that the Supreme Court of Canada in *R. v. McNeil*, *supra¸* clearly established that *O’Connor* applied even whether there no reasonable expectation of privacy in the third party record. Specifically, the Court stated:

11 First, by limiting the applicability of the *O’Connor* production regime to those cases where a third party has an expectation of privacy in the targeted documents, the decision under appeal raises some uncertainty concerning the appropriate mechanism for accessing third party records when it is unknown whether a reasonable expectation of privacy attaches. As I will explain, the procedure set out in *O’Connor* provides a general mechanism at common law for ordering production of any record beyond the possession or control of the prosecuting Crown. Whether or not the targeted record is subject to a reasonable expectation of privacy is one of the questions that must be determined at the hearing of an *O’Connor* application. For that pragmatic reason alone, the operation of the common law production regime cannot be premised on the existence of a reasonable expectation of privacy.

* + 1. Whether or not there is a reasonable expectation of privacy is a factor which is considered at the second stage of the *O’Connor* regime and may result in certain restrictions or redactions in what is provided to the Applicant. As stated in *McNeil*,

32 Second, while the *Mills* regime retains the two-stage framework set out in *O’Connor*, it differs significantly in that much of the balancing of the competing interests is effected at the first stage in determining whether production should be made to the court for inspection. This reflects Parliament’s assumption that a reasonable expectation of privacy exists in the types of records targeted by the statutory regime: see *R. v. Clifford* (2002), 163 C.C.C. (3d) 3 (Ont. C.A.), at paras. 48-49. An equivalent presumption of privacy does not attach in respect of all third party records that fall outside the *Mills* regime. Hence, any balancing of competing interests is reserved for the second stage of the *O’Connor* regime, when the documents can be inspected by the court to better ascertain the nature of the privacy interest, if any. Because of these significant differences, it is important not to transpose the *Mills* regime into the *O’Connor* production hearing in respect of documents to which the statutory dispositions do not apply. [Emphasis added]

* + 1. In a situation, such as the one before the Court, where the third party is a public body and the policy applies to its interaction with the public, there may be little if no privacy interest in the third party record. In this regard, the analysis in *Horzempa* may be applicable at the second stage of the *O’Connor* regime.
1. CONCLUSION
	* 1. For the reasons stated, I have decided that the RCMP Release Policy (as specifically defined below) is “likely relevant” to the trial of the Applicant.
		2. The RCMP shall disclose any and all policies (including those currently existing and those existing on May 1, 2021) relating to the release from custody of a person who has been arrested without warrant pursuant to s. 498 (collectively referred to below as the “RCMP Release Policy”). This disclosure shall be implemented as follows:
			1. The RCMP will provide the RCMP Release Policy to the counsel for the RCMP;
			2. Counsel for the RCMP will review the RCMP Release Policy for safety, security and privilege concerns and indicate any proposed redactions to the RCMP Release Policy;
			3. Counsel for the RCMP will provide a redacted copy and an un-redacted copy of the RCMP Release Policy to the Court along with submissions setting out the basis for those redactions in the form of a sealed memo to the Court.
		3. This disclosure should be completed within three weeks of the date of this Decision. The Court will order production to the Applicant in accordance with the second stage of *O’Connor* following inspection of the RCMP Release Policy.

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|  |  | Garth MalakoeT.C.J. |
| Dated at Yellowknife, Northwest Territories, this 21st day of January, 2022. |  |  |

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