

Citation: *R. v. Sidhu*, 2021 YKTC 47

Date: 20211108
Docket: 19-00393
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Brooks

REGINA

v.

NAVKARAN SINGH SIDHU

Appearances:
Benjamin Eberhard
Jennifer Budgell

Counsel for the Crown
Counsel for the Defence

RULING ON VOIR DIRE

[1] Mr. Navkaran Sidhu is charged on a two-count Information that on August 20, 2019, he possessed cocaine for the purposes of trafficking and, second, that he resisted a police constable in the execution of his duty.

[2] At the outset of the trial a *voir dire* was declared in order to consider a number of *Charter* issues raised by the defence. In the reasons that follow, I have organized the evidence, findings of fact, and analysis around those issues.

Issues

1. Was Mr. Sidhu arrested without reasonable grounds thereby breaching his rights under s .8 and s. 9 of the *Charter of Rights*?

2. Was the strip search of Mr. Sidhu a breach of his rights under s. 8 and s. 9 of the *Charter of Rights*?
3. If any of Mr. Sidhu's s. 8 and s. 9 rights were breached, what is the remedy?

Was Mr. Sidhu Arrested without Reasonable Ground thereby Breaching his Rights under s. 8 and s. 9 of the *Charter of Rights*?

[3] Three police witnesses were called by the Crown, however, only the evidence of Cst. Smee and Cpl. Hutton were germane to the issues on the *voir dire*. For reasons which I will develop, it is the evidence of Cpl. Hutton which is the critical evidence in resolving this first issue.

[4] I note at the outset that both officers have significant experience in investigating offences under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. I have borne that experience in mind throughout my analysis of their observations, actions, and conclusions.

[5] On August 20, 2019, Cst. Smee and Cpl. Hutton were outside 408 Alexander Street in Whitehorse involved in unrelated investigations. Cst. Smee saw a known drug user named Meredith Couture, a resident of that street, pass by him. She was on her phone and she appeared to be looking for someone. Cpl. Hutton also saw Ms. Couture and, from his observation, thought this was a time of heavy drug use for Ms. Couture. Minutes later, Cst. Smee drove onto 4th Avenue and saw Ms. Couture in a vehicle driven by Mr. Sidhu, a person also known to him. From this point on it becomes critical, in my view, as to what Cst. Smee did see – and did not see – and what he

communicated to Cpl. Hutton. This is because it was Cst. Smee who actually conducted the surveillance of Mr. Sidhu and Ms. Couture but also because it is Cpl. Hutton who gave the direction for the arrest of Mr. Sidhu on the basis that it was Cpl. Hutton who formed the reasonable grounds for that arrest.

[6] During submissions, both counsel submitted that I should still bear Cst. Smee's evidence in mind in determining the issue of reasonable grounds. I certainly do intend to keep that important evidence in mind, however, I am of the view that it is only Cpl. Hutton's grounds that require analysis to determine the first issue. I say that for the following reasons. First and foremost I do so because it is Cpl. Hutton who gave the direction for the arrest of Mr. Sidhu. Cst. Smee gave no such direction nor did he suggest that he eventually arrested Mr. Sidhu because of his own, separately formed, reasonable grounds. I find as a fact that Cst. Smee arrested Mr. Sidhu because of Cpl. Hutton's direction. Second, the assessment of reasonable grounds for arrest ought not to be made on the basis of some patchwork "corporate" knowledge about an investigation. The determination of reasonable grounds for arrest is a critical step in any investigation and the responsibility for taking that step ought not to be diluted by scouring through various officer's state of knowledge to piece together those grounds. With the greatest of respect to Crown Counsel's thorough and helpful written submission, I noted that it strayed several times into a "global" consideration of reasonable grounds. It is my view that I ought not to analyze the issue in that way but, as I have said, focus on Cpl. Hutton's grounds.

[7] I am comforted in that conclusion by noting that, in any event, Cst. Smee did not have reasonable grounds for arrest. A critical fact in the formation of reasonable

grounds, in this particular case, was that Ms. Couture, some time after she was in the company of Mr. Sidhu, was in possession of drugs. Cpl. Hutton was the one who found Ms. Couture and the drugs in her hand and, on the basis of all the evidence, I have concluded that Cpl. Hutton did not tell Cst. Smee of that discovery. Without that critical piece of evidence, it is clear that Cst. Smee did not have reasonable grounds for arrest.

[8] Having said that, however, and to repeat, I intend to take into account Cst. Smee's evidence of his observations as they provide the context and texture to what he communicated to Cpl. Hutton as the latter formed his grounds.

[9] The observations that are the basis of the reasonable grounds come from Cst. Smee's recollection and from the contemporaneous radio communications entered as an exhibit in these proceedings. The radio communications have the benefit of providing precise times to some of the events that Cst. Smee saw in front of him. Those precise times and the observations made – and not made – during that time are central to this first issue before me.

[10] To return to the chronology of events, it is within minutes of leaving Alexander Street that Cst. Smee saw Ms. Couture in a grey Chevy driven by Mr. Sidhu. Cst. Smee recognized Mr. Sidhu but did not recall his name so at 12:46 p.m. he radioed to Cpl. Hutton asking "who is that guy who hangs around with two others (known drug traffickers) and drives a Chevy. He's been driving around all morning". Cpl. Hutton gave Mr. Sidhu's name. Cpl. Hutton was able to do so because, although he had nothing "concrete" (ie. no arrests or searches of him) with respect to Mr. Sidhu, Cpl. Hutton had interacted with him three or four times. On at least one occasion, Cpl. Hutton had found

Mr. Sidhu with drug traffickers. Cst. Smee told Cpl. Hutton that Mr. Sidhu has just picked up Ms. Couture.

[11] Cst. Smee followed the car to where it parked in a McDonald's restaurant parking lot. On the way there he believed Ms. Couture looked back and saw him. Cst. Smee parked his marked police car across the street from McDonald's where he could see the Chevy. He radioed back to Cpl. Hutton at 12:48 p.m. that "he's probably doing a McDonald's run to cover it up." Cst. Smee testified that drug dealers go through a drive thru in order to thwart surveillance. The Chevy did not do that. It just sat in the parking lot for four or five minutes. He could not see anything of what happened inside the car. At no time did Cst. Smee even suggest that he saw any movements that implied a drug transaction. All he could say is that no one got out of the car and in particular, no one went into the restaurant. Cst. Smee thought it significant that the car parked at a restaurant but no one from the car used the restaurant. Cpl. Hutton testified that he was not told by Cst. Smee that no one got out of the car.

[12] After his four or five minutes of watching the McDonald's parking lot (making it now approximately 12:53 p.m.) the Chevy left and went behind a neighbouring hotel and out on to the street near a restaurant. Mr. Sidhu did not go the direct route on to the street from the McDonald's parking lot. Cst. Smee thought this was a manoeuvre to thwart surveillance. This particular evidence is quite important to the grounds that Cpl. Hutton stated that he had as the basis for the direction to arrest and I will return to the conflicting evidence about it.

[13] Cst. Smee lost sight of the Chevy for one or two minutes then picked it up again as it drove through an intersection. Given he was in a marked vehicle he decided not to follow it any further.

[14] Cpl. Hutton meanwhile had left 408 Alexander Street. He was aware of Cst. Smee's observations at least up to the time of them being in the McDonald's parking lot. Cpl. Hutton testified that after these communications he could not get close enough to be involved in any surveillance so he went back to 408 Alexander. The purpose of doing so was to see if Ms. Couture returned in a timely way. She did return and was arrested at approximately 13:03 in the lobby of 408 Alexander. She opened her hand and in her hand were drugs: six rocks of crack cocaine weighing approximately two grams and a further gram of loose cocaine. Cpl. Hutton agreed in cross-examination that he had not seen where she was coming from, if she had been dropped off by Mr. Sidhu or who she had interacted with between the time she was with Mr. Sidhu and when she arrived at the lobby.

[15] Cpl. Hutton broadcast that Mr. Sidhu was to be arrested for trafficking.

[16] Cpl. Hutton stated that his grounds for arrest of Mr. Sidhu were as follows:

- based slightly on Mr. Sidhu's previous interaction with drug traffickers;
- his experience telling him that drug transactions are carried out by a person being picked up (in this case a known user), driven around and then dropped right back off;
- here Mr. Sidhu met with a heavy drug user in his car;

- they did nothing specific other than just laps. In cross-examination his answer was different in that he said that “they did a loop coming back”;
- their interaction fit the pattern of drug transactions, a reference to his experience as set out above;
- Ms. Couture had drugs in her hand which indicated to Cpl. Hutton that she had just got those drugs; and
- the way it was packaged was consistent with this pattern of drug transaction.

[17] I intend to analyze these grounds after reviewing the legal principles that must guide that analysis.

[18] I have been referred to the following authorities: *R. v. Storrey*, [1990] 1 S.C.R. 241; *R. v. Simpson*, [1993] 12 O.R. (3d) 182 (C.A.); *R. v. Brown*, 2012 ONCA 225; *R. v. Sohi*, 2018 BCSC 2145; *R. v. Pope*, 2015 BCSC 2391; *R. v. Basanez*, 2017 ABCA 70; *R. v. McEwan*, 2017 ONSC 6055; *R. v. Yeh*, 2009 SKCA 112; *R. v. Caslake*, [1998] 1 S.C.R. 51; *R. v. Luong*, 2010 BCCA 158; *R. v. Hanson* (2009), CarswellOnt 5914 (Sup. Ct.); *R. v. Tran* 2007 BCCA 491; *R. v. MacKenzie*, 2013 SCC 50; *R. v. Lawes*, 2007 ONCA 10; *R. v. Labelle*, 2016 ONCA 110; *R. v. Abdul-Hamid*, 2015 ONCA 179; *R. v. Dhillon*, 2016 ONCA 308 (which overturned the decision in the defence book of authorities *R. v. Dhillon*, 2014 ONSC 6287); *R. v. Jir*, 2010 BCCA 497; *R. v. Curson* (1990), CanLII 292 (B.C.C.A.); *R. v. To* (1998), 109 B.C.A.C. 242. I have taken all of

them into account but intend to only summarize those which I have found of the most assistance to my analysis.

[19] In *Storrey*, the Supreme Court of Canada, at para. 17, set out the two parts to the assessment of reasonable grounds for arrest as follows:

In summary then, the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a prima facie case for conviction before making the arrest.

[20] In *Luong*, the British Columbia Court of Appeal considered the phrase “placed in the position of the officer” from the above quote from *Storrey*. At para. 19, the Court said, relying on the authorities of *Tran* and *To*:

Being “placed in the position of the officer” does not just mean making the same observations as the officer, as to many lay people such observations would be meaningless. Included in the assessment of whether the grounds for arrest are reasonable is the officer’s experience, training and knowledge.

[21] The vantage point must be that of a “prudent, reasonable and cautious police officer similarly experienced as the arresting officer” (*Pope*, at para. 58). Nor must the assessment be done from an overly jaded, jaundiced or negative view (*Pope*, at para. 60).

[22] As well, the objective assessment is not to be deferred to the officer as to do so would make that assessment meaningless (*Sohi*, at para. 27; *MacKenzie*, at para. 64).

[23] It goes without saying that the assessment must take into account the totality of the circumstances without resorting to a piece meal analysis. The matter, in a slightly different context, was summarized in the following way by the Supreme Court of Canada in *Mackenzie* at para.65:

In sum, while it is critical that the line between a hunch and reasonable suspicion be maintained to prevent the police from engaging in indiscriminate or discriminatory practices, it is equally vital that the police be allowed to carry out their duties without undue scepticism or the requirement that their every move be placed under a scanning electron microscope.

[24] With that review of the applicable principles, I turn to the analysis of Cpl. Hutton's grounds for arrest.

[25] First, it goes without saying that, on a subjective basis Cpl. Hutton believed that he had grounds for arrest. The real issue is whether, on an objective basis, such grounds existed.

[26] I intend to proceed through the grounds as articulated by Cpl. Hutton. I do that as it is clear that Cpl. Hutton is a highly experienced police officer who had no difficulty in articulating his grounds. As such, I do not feel that focusing on his grounds causes me to look at anything but the totality of the circumstances. At the same time, while I will, of necessity, review those grounds individually and in detail, I intend to bear in mind that Cpl. Hutton's grounds are not to be analyzed piece meal or as if under an "electron microscope".

[27] The first factor Cpl. Hutton described as "slightly" of significance to his grounds is Mr. Sidhu's prior association with drug traffickers. On an objective basis, the slight

consideration given to this factor is entirely appropriate. First of all there is very little history of interaction of Cpl. Hutton with Mr. Sidhu. Second, that interaction can only lead to a general conclusion about Mr. Sidhu of very little value in dealing with a specific action on a specific day.

[28] The second factor in Cpl. Hutton's grounds is that his experience told him that drug transactions are carried out by picking someone up, having the exchange, then dropping them right back off again. On an objective basis, it must be acknowledged that that is one way in which a drug transaction is carried out. Yet that scenario must be placed in the context of the innumerable, and more blatant, ways in which a drug transaction can occur. It is obvious that a transaction may also occur with a car pulling over and the exchange occurring without anyone even getting into the car. It may occur outside of the car with a hand to hand exchange. There are as many ways for a transaction to be carried out as there are individuals who wish to do so. I mention all of this, not to second guess Cpl. Hutton but to make clear that, on an objective basis, once the behaviour moves farther away from a quick and clear exchange and towards conduct that is more ambiguous and consistent with completely innocuous behaviour the grounds for arrest are weakened. I do not suggest for a moment that there must be evidence of observations of an actual exchange for reasonable grounds to be established. What I do say is that the actions of the accused, in the context of the totality of the circumstances, must lead an objective observer to conclude that there are reasonable grounds for arrest, in this case, for a trafficking offence.

[29] Having said all that, it is also important to look at what information Cpl. Hutton did have that led to the inference that this behaviour was that of a drug transaction. This is

a topic of critical significance as I view this first issue. Some of the analysis I refer to at this point will be reviewed again as to what Cpl. Hutton knew and when he knew it.

First, Cpl. Hutton had the information of Ms. Couture leaving her apartment and a short time later the two of them together in Mr. Sidhu's Chevy. They stopped at a McDonald's parking lot (arriving at 12:48 p.m.), remaining there for four to five minutes. Cpl. Hutton had absolutely no information about what Mr. Sidhu and Ms. Couture did during that time. He was not told that they then drove to an area which was within six minutes walking distance of Ms. Couture's home before she walked into the lobby of that residence. While that description can be consistent with a drug transaction as Cpl. Hutton described, it has to be noted that the four to five minutes in the McDonald's parking lot is a long time for a transaction that is, and must be, swift. Any inference suggesting a transaction is further weakened by the fact that Ms. Couture's drop-off point is unknown. That fact creates, at the very least, the possibility that the drug transaction occurred after she left the company of Mr. Sidhu. In short, the timing in the parking lot and the six minutes where Ms. Couture is completely lost to observation is a poor fit for a description of this as a drug transaction. This too must be taken into account in an objective assessment of Cpl. Hutton's grounds.

[30] The next factor identified by Cpl. Hutton is that Mr. Sidhu met with a heavy drug user. Certainly, objectively, the possibility of a drug transaction is higher with a heavy user than with an upstanding member of the community. Yet any objective assessment must treat this factor with care. No individual is so one dimensional that they only engage in one activity and only one activity. There may be many reasons why a woman may meet with a man. More importantly, and particularly when considering the rights of

a citizen, no assessment should be made that has the effect of creating two levels of expectation of privacy: one for drug users and one for everyone else. To do so creates tiers of rights, a result inconsistent with an appropriate analysis.

[31] The next factor of Cpl. Hutton's is that the two while together did nothing specific other than to drive in laps. This behaviour was described by Cpl. Hutton as similar to other drug deal scenarios. The evidence of "laps" was described in various and contradictory ways in the evidence. The timing of when Cpl. Hutton was told of these "laps" was also unclear. In order to objectively assess the reliability of this information and its value, if any, to the formation of reasonable grounds, it is necessary to resolve the contradictions in the evidence.

[32] As Cpl. Hutton was not conducting any surveillance, his source of knowledge of "laps" is the radio communications he received from Cst. Smee. Those radio communications were entered as an exhibit in this *voir dire*. However, there are no radio communications between Cst. Smee and Cpl. Hutton after Cst. Smee's statement that "he is probably doing a McDonald's run to cover it up" until Cpl. Hutton broadcasts his arrest of Ms. Couture. It will be remembered that this is a time gap of 15 minutes.

As is stated in an Admissions of Fact entered as Exhibit 3 in the *voir dire*:

The radio communications that were disclosed include a communication between Cst. Smee and Cpl. Hutton with a time stamp of 12:48:09. There is a brief radio communication with a time stamp of 12:52:45. The next radio communication in sequence has a time stamp of 13:03:30.

[33] On the basis of the exhibit, Cpl. Hutton received no information of the driving behind the hotel and out on the street or of any kind of evasive or suspicious driving.

Yet Cst. Smee testified that he did communicate Mr. Sidhu engaging in evasive driving. He testified that he radioed to Cpl. Hutton, amongst other things, that Mr. Sidhu was behind Day's Inn and he had lost Mr. Sidhu.

[34] Cpl. Hutton's evidence was, at first, that he did not believe that he received any radio communications regarding surveillance between 12:48 and 13:03. This, of course, is consistent with the radio communications in the exhibit. When asked the same question in a different way, he answered that he did not remember any radio communications in that time frame. In cross-examination, Cpl. Hutton agreed that Cst. Smee did not communicate that the occupants remained in the vehicle at McDonald's. Also he did not believe that he told Cst. Smee that he was going back to 408 Alexander to determine if Ms. Couture possessed drugs. As to specific evidence about "laps", Cpl. Hutton testified early in his evidence that Cst. Smee broadcast that Mr. Sidhu – at some unspecified time - was doing loops downtown. Later in his testimony, he said that Cst. Smee broadcast that "they did a loop" but that Cpl. Hutton did not know if the loop was before or after McDonald's. On the one hand, the use of the plural "they" suggests it was an observation made while Mr. Sidhu and Ms. Couture were together in the car. On the other hand, such a communication could not have happened after McDonald's if the accuracy of the radio communications is accepted.

[35] All of this evidence regarding loops is important because Cpl. Hutton inferred that a loop "not really going anywhere" was consistent with heat checks by Mr. Sidhu to see if he was being followed by the police; "that was what I thought was going on." Of course he had not been told by Cst. Smee that he (Smee) believed that on the way to McDonald's Ms. Couture had looked back and seen him. Had he been told that, he

would have been less likely to believe that Mr. Sidhu was checking to see if he was being followed by the police.

[36] Accordingly, given these inconsistencies it is important to conclude what is the reliable evidence to be used in an objective assessment of reasonable grounds.

[37] I have concluded that the reliable evidence is that of the radio communications. Obviously, those communications do not have any frailties of memory or perception. While evidence was led of efforts to locate radio communications that may have gone “missing” between the time of McDonald’s and the arrest of Ms. Couture, it became clear that communications had not gone missing. The reality had to be that the radio recording system accurately reflected what transpired: there were no radio communications of substance between 12:48 and 13:03. Finally, the suggestion in the evidence that the communications may have occurred over cell phones rather than the police radio had the air of grasping at straws rather than an actual recollection. As to whether the reference to loops or laps had its origin in Cst. Smee’s early radio communication, (“he’s been driving around all morning”) is, at this point, conjecture. All I am able to conclude is that, on an objective basis, there was nothing conveyed over the radio communications of any driving behaviour that could be added to the reasonable grounds. This finding is particularly important given Crown Counsel’s reliance on the importance of the driving evidence in this case.

[38] The next factor is that their interaction fit the pattern of drug transactions in Cpl. Hutton’s experience. To a significant extent this is a repetition of an earlier factor in his reasonable grounds. As I have already analyzed, it may be more precise to say on

an objective basis, taking the place of a cautious but experienced police officer, that their interaction had nothing inconsistent with a drug transaction.

[39] The next factor taken into account by Cpl. Hutton was that Ms. Couture had the drugs in her hand when she was arrested which suggested that she had recently received the drugs. In most fact situations that would be a very compelling observation. This particular case is different. It was at the McDonald's parking lot where it was thought that the drug transaction occurred. I have already noted the lengthy amount of time that was spent in the parking lot if that was the transaction. Then the vehicle left and drove for several minutes where it was seen by Cst. Smee. Then there is a period of six minutes in which nothing is seen of what Ms. Couture did. Did she walk down the street for that time with drugs in her hand? Or did she receive the drugs just before entering her apartment building? Cpl. Hutton's grounds presuppose that she just received the drugs but that supposition leads more to receiving them after leaving Mr. Sidhu rather than having them in her hand for about 10 minutes when she was with Mr. Sidhu. Additionally, and to repeat, it is key that there is 15 minutes in which Cpl. Hutton receives no information about the activities of Mr. Sidhu and Ms. Couture.

[40] The next factor taken into account by Cpl. Hutton was that the drugs were packaged in a way that was consistent with the kind of transaction thought to have been conducted with Mr. Sidhu. Clearly, that is a very general observation which does very little to bring these drugs from any transaction to a specific transaction related to Mr. Sidhu. The obvious reality is that these drugs were packaged as they would have been for any low level transaction and do not in any way identify this handful of drugs as a transaction with Mr. Sidhu. The weight of this factor must also be slight.

[41] The result of this analysis shows that the objective component of reasonable grounds to arrest has not been met in this case. In looking at the factors relied on by Cpl. Hutton I have not failed to take into account their weight in its totality. Although I have referred to each factor separately out of necessity, I have considered their combined impact. What we have is a heavy drug user meeting with a person about whom the police have a hunch is a drug dealer. They drive for a short distance, stop and park for four or five minutes. They then return in the direction of where the drug user lives and then for six minutes (on Cst. Smee's observation, more than 10 minutes to Cpl. Hutton's knowledge) there is absolutely no observation of the drug user. At the end of those six minutes she has drugs in her hand. To conclude that this constitutes reasonable grounds for arrest would be to permit a scope of arrest that is breath taking. I have compared these facts to those contained in the cases cited to me. In none of them is there so meagre a set of facts on which an arrest was found to be properly based. The cases are clear in requiring tangible observations leading to a reasonable conclusion not, as here, large gaps in observations only to be filled in by hunches and guess work. While Cpl. Hutton said that he gave only slight weight to Mr. Sidhu's associations, the reality must be that those associations were given great weight. There was simply no other basis that a meeting over the course of 15 minutes between two people could be viewed as more than suspicious. As I have said, it cannot be that those who are suspected by the police have a lower expectation of privacy than every other citizen. That does not, in any way, restrict the police. A hunch can be the basis of good police work. It can never be the sole basis of a valid arrest. As was stated in

Simpson at para. 61, "...A 'hunch' based entirely on intuition gained by experience cannot suffice, no matter how accurate that 'hunch' might prove to be. ..."

[42] Accordingly, I have concluded that Mr. Sidhu's ss. 8 and 9 rights were breached by the arrest conducted without reasonable grounds.

Was the Strip Search of Mr. Sidhu Contrary to s. 8 of the *Charter of Rights*?

[43] I have already determined that the arrest of Mr. Sidhu was done without reasonable grounds and contrary to his rights. That arrest was the foundation for the stopping of Mr. Sidhu approximately 35 minutes later. Accordingly, the strip search was also without the requisite grounds and constitutes a further breach of Mr. Sidhu's rights.

[44] Nevertheless, it is important to analyze the strip search in this case as the findings of fact may have relevance to the resolution of the exclusion of the evidence under s. 24(2) of the *Charter*. Additionally, in the event that I am in error in my analysis of the arrest issue, the findings of fact with respect to the strip search may still have some significance.

[45] In order to understand the issues surrounding the strip search, it is necessary to set out the facts of the grounds for that search, the manner in which that search was conducted and how that decision to search and conduct of the search complied with RCMP policy.

[46] Identification in the name of Mr. Sidhu, cash, a weapon and three cell phones were among the items found in the car. Drugs were located on Mr. Sidhu as a result of the strip search.

[47] As a result of the direction from Cpl. Hutton that Mr. Sidhu was arrestable, Cst. Smee began to look for Mr. Sidhu. He sought to do so as soon as possible given the possibility of the loss of evidence. At approximately 13:38 (35 minutes since the direction to arrest Mr. Sidhu), Cst. Smee observed Mr. Sidhu driving in his vehicle on the Alaska Highway north of downtown Whitehorse. Cst. Smee pulled in behind Mr. Sidhu and turned his overhead lights on. To Cst. Smee's observation, Mr. Sidhu took a long time to pull over, a "marked departure" from what he usually sees in pulling a vehicle over. To Cst. Smee, this departure was significant as it raised the concern that items were being moved around in the vehicle or that calls were being made to impede the investigation. Cst. Smee approached the vehicle and told Mr. Sidhu that he was under arrest for trafficking and asked him to step out of the vehicle. During this exchange, Mr. Sidhu reached for the console which raised a concern of officer safety. As a result, Cst. Smee pulled Mr. Sidhu out of the vehicle and took him to the ground. The car began to roll away. Members of the public assisted in stopping the vehicle. Once on the ground Mr. Sidhu was compliant. Cst. Smee conducted a pat down search which he described as "cursory". He located nothing. He then placed Mr. Sidhu in the back of the police vehicle. He advised Mr. Sidhu of his right to counsel and Mr. Sidhu said he wanted to call a lawyer. Cst. Smee told Mr. Sidhu that he would be brought to the remand centre and a strip search would be conducted.

[48] In cross-examination, he agreed that he did not see Mr. Sidhu reach for his waist band. He also agreed that he had made the decision of a strip search at the time of the pat down search, that is to say before the search of the vehicle had been done.

[49] Cst. Smee was asked his grounds for the strip search. He stated that it was his experience that individuals hide drugs in their underwear. He said that is the case as individuals know that the police will not touch there in a pat down search and therefore the drugs may escape detection: “it is very common that drugs are kept near the genitals”. He stated that the delay in pulling over made it very likely that Mr. Sidhu had the opportunity to hide drugs. He said that he has found drugs hidden in this way “countless” times.

[50] In cross-examination as to his grounds, Cst. Smee testified that he had no conversations (other than with Cst. Faulkner) about doing the strip search. He agreed that strip searches in trafficking arrests were fairly routine. He was asked if in almost every case of possession for the purposes of trafficking and trafficking he would feel it necessary to do a strip search and he said “correct”. He said that a strip search would not occur when he believes that he has found everything. Cst. Smee acknowledged that his report as to his grounds made no mention of Mr. Sidhu but testified that the whole report contained grounds as to Mr. Sidhu.

[51] Cst. Smee sought and received authorization for the strip search from his supervising officer, Cst. Faulkner. He did so in a conversation with Cst. Faulkner who had arrived at the scene.

[52] At the remand centre, Cst. Smee told Mr. Sidhu how the search was going to be conducted, namely, that he would remove a piece of clothing, that clothing would be searched and then it would be returned to him. They would proceed through each item of clothing. He would never be naked. When Mr. Sidhu removed his underwear a bag

fell out with a number of bags inside that appeared to contain cocaine. Once the search was completed he was taken to make a call to his lawyer.

[53] Cpl. Hutton also testified with respect to the strip search. He testified that in his opinion a strip search was justified. A factor in that justification was what had been and not been found to that point. This opinion was held at the scene of the arrest, after the pat down search had yielded no results but before the vehicle had been properly searched. It was also his experience that very often drugs are hidden in underwear. The fact of the vehicle not having been searched “didn’t matter” as it is common to find drugs in both places. According to Cpl. Hutton “a trafficker almost always puts drugs into their underwear when pulled over”.

[54] Surprisingly, Cpl. Hutton testified that he sought and received authorization for the strip search at the scene from Cst. Faulkner. Cst. Smee was not present at that time. Cpl. Hutton did not tell Cst. Smee that Cst. Faulkner had authorized the strip search as Cpl. Hutton would have only told Cst. Smee if Cst. Faulkner had not authorized it. It is obvious that his evidence on this point is very curious. The obvious questions which arise include: if he wasn’t going to do a strip search then why did he seek authorization for it? How can it be that Cpl. Hutton seeks and receives authorization from Cst. Faulkner yet Cst. Smee has already received the authorization? Such a conversation having occurred simply makes no sense. This tends to cast a pall of unreliability over Cpl. Hutton’s evidence. For this reason and because Cst. Smee had the additional observations of Mr. Sidhu at the stop, it is the grounds of Cst. Smee that need to be analyzed to resolve this second issue.

[55] The conflict in the evidence between Cpl. Hutton and Cst. Smee that each of them obtained their authorization for the strip search from Cst. Faulkner is not assisted by Cst. Faulkner. In the Admissions of Fact entered as Exhibit 3 in these proceedings it is admitted, “Cst. Chris Faulkner has no notes or reports relating to the investigation of Navkaran Singh Sidhu or Meredith Couture on August 20, 2019”.

[56] No evidence was led as to what, if anything, was said to Cst. Faulkner in order that he exercise his own judgment as to the grounds for authorizing or not authorizing the strip search.

[57] Cpl. Hutton was asked in cross-examination whether he had ever not sought that authorization for a strip search in a trafficking case and he answered that it would depend on how the arrest took place and what had been previously found. Authorization would not be sought if they had located all the evidence.

[58] Both Cst. Smee and Cpl. Hutton agreed that the search of the vehicle was ongoing independent of the strip search. To Cpl. Hutton, the strip search ought not to wait for the vehicle search as that would mean that the accused was waiting too long for their lawyer call, a linkage which was left unexplained.

[59] The Prisoner Report (entered as Exhibit 4) is not corroborative that there was authorization of the strip search as the appropriate section is blank except for the note that the strip search was conducted by Cst. Smee. Nor is there a recording of the reason for the strip search although, admittedly, it would be difficult for anyone to record those reasons on this form as there is only enough room to write a phone number in the space provided.

[60] Given this summary of the evidence, what is the analysis that flows from the authorities?

[61] I have reviewed the authorities provided including: *R. v. Golden*, 2001 SCC 83; *R. v. McGuffie*, 2016 ONCA 365; *R. v. Sekhon*, 2020 BCSC 2180; and *R. v. Johnson*, 2016 ONSC 3947.

[62] The leading case with regard to the requirements and limitations on a strip search is *Golden*. In fashioning the appropriate test, the Court emphasized, given the “humiliating, embarrassing and degrading” nature of strip searches, that it was necessary to have a means of preventing unjustified searches before they occur (para. 89). The first step in the analysis is that the arrest be lawful and second, that the search must be incident to arrest. However, the meeting of those two requirements does not give automatic authority to conduct a strip search. Additional grounds are required by the police establishing that they have reasonable and probable grounds for concluding that a strip search is necessary. The Court stated at para. 98:

In order to meet the constitutional standard of reasonableness that will justify a strip search, the police must establish that they have reasonable and probable grounds for concluding that a strip search is necessary in the particular circumstances of the arrest. [emphasis added]

[63] I feel it is appropriate to emphasize the word “necessary” in light of the admonition of the Supreme Court of Canada (at para. 95) that strip searches cannot be carried out as a matter of routine police policy. As to the conduct of a strip search, the Court found that 11 English guidelines contained in their legislation were in accordance with s. 8 of the *Charter* and would provide a framework for a decision in the Canadian

context. Of note for this factual scenario are two of those guidelines. First is the approval of the strip search by a police officer acting in a supervisory capacity. The second is the last guideline which states, “Will a proper record be kept of the reasons for and the manner in which the strip search is conducted?”

[64] The analysis of this second issue has the unusual problem that two officers say it was they who had the reasonable grounds and therefore sought authorization from a superior officer. Indeed it is not just unusual, it is unlikely. It makes no sense. Why would Cst. Faulkner give authorization for a strip search to one officer when he has just given it to another? What does make sense is that Cst. Smee, who was actively involved with Mr. Sidhu, sought and received the authorization. I have concluded that Cpl. Hutton is mistaken in his evidence that he sought authorization. As such I do not feel it necessary to separately analyze his grounds for seeking that authorization although I will certainly consider his evidence to the extent that it is corroborative of Cst. Smee.

[65] From the evidence that I have summarized, there are two elements to the reasonable grounds Cst. Smee asserted in support of the necessity of a strip search. They were, first, that traffickers very commonly hide drugs in their underwear and, second, Mr. Sidhu had acted in such a way when directed to stop that led Cst. Smee to infer that he was hiding something.

[66] I have concluded that those grounds are insufficient to justify the strip search on the facts of this case. My reasons are as follows. In doing so I bear in mind the

authorities as to reasonable grounds referred to much earlier in these reasons in addition to those which specifically address strip searches.

[67] The experience that drug traffickers very commonly hide drugs in their underwear is, in this context, a consideration that must be treated with great care. I say that because if that experience is given its full force and effect it will mean that strip searches are done as a matter of routine. *Golden* specifically states that that is not to occur. The objective of preventing unjustified searches before they happen will be frustrated if there are not specific grounds arising from the specific case. Yet Cst. Smee's answers on cross-examination are clear that strip searches in trafficking arrests are "fairly routine". He testified that in almost every case of possession for the purposes of trafficking and trafficking he would feel it necessary to do a strip search. The experience that traffickers commonly hide drugs in their underwear ought to be the starting point to forming grounds for a strip search not an end point. Here the totality of the circumstances make it clear a strip search was to occur here as a matter of routine.

[68] The observation by Cst. Smee of the marked departure from the norm in Mr. Sidhu pulling over appears at first blush to raise a fact specific justification. Yet in virtually every case there will be an opportunity to hide drugs. This observation too is one that is too general to make a strip search, in this particular case, "necessary".

[69] What is specific to this case tends to undercut the general considerations relied on by Cst. Smee. In this case, Cst. Smee set out immediately to find Mr. Sidhu on receiving the direction to arrest. His reason for doing so was a concern over the loss of evidence. He does not locate Mr. Sidhu for 35 minutes. This is a substantial period of

time in which, on an objective basis, the possibility of Mr. Sidhu being in possession of drugs is ebbing away. Second, Cst. Smee decided on the strip search before the car had been searched. Cst Smee testified that he might not conduct a strip search (ie. it might not be “necessary”) if he felt that he had retrieved all the drugs without that search. How could he ever get to that position if he did not search the car first? His decision, particularly given when he made that decision, reinforce that it was made as a matter of routine.

[70] In coming to this conclusion, I do not intend to state that in every case the decision to strip search must await the outcome of a search of a vehicle. What I am taking from *Golden* is that each case must be viewed individually for those grounds additional to those justifying arrest that make a strip search necessary. The circumstances of this case, somewhat unique in the time delay involved, illustrate considerations which are essential to the grounds required to conduct a strip search.

[71] There is an additional issue with this strip search. The English legislation, approved of (at para. 101) in *Golden*, suggests that a proper record be kept of the reasons for and the manner in which the strip search was conducted. That did not occur here. Indeed, the record in this case does not even indicate that the strip search was approved. Additionally, the form leaves totally inadequate space for the reasons for the approval of the strip search. I reject the suggestion that this is just a matter of “inadequate paperwork”. The record in question is one which the Supreme Court of Canada has approved as in accord with the constitutional requirements of the *Charter*. In my respectful view, documents which have constitutional implications are never just paperwork. They are part of constitutional compliance. They must be treated that way.

[72] While I do accept Cst. Smee's evidence that he sought and received Cst. Faulkner's authorization for the strip search I do view the failures of the record keeping to constitute a breach of s. 8 of the *Charter*.

What is the Remedy for the Breaches of s. 8 and s. 9 of the *Charter*?

[73] The defence seeks to have excluded, pursuant to s. 24(2) of the *Charter*, the fruits of the strip search conducted at the jail. Seized from Mr. Sidhu were 16 "spits" of powder cocaine and 58 "spits" of rock cocaine. The total weight, including the bags, was 26.7 grams.

[74] I have been referred to and have considered the following with respect to s. 24(2) of the *Charter*: *R. v. Grant*, 2009 SCC 32; *McGuffie*; *R. v. Brown*, 2012 ONCA 225; *R. v. Pasian*, 2015 ONSC 1557; and *R. v. Kitaitchik* (2002), 161 O.A.C. 169.

[75] In *Grant*, the Supreme Court of Canada set out the test for s. 24(2) of the *Charter*. That test requires three lines of inquiry: first, the seriousness of the *Charter*-infringing state conduct; second, the impact of the breach on the *Charter*-protected interests of the accused and third, society's interest in an adjudication on the merits. About that inquiry, the Court states at para. 68:

...The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute.

[76] That inquiry must take into account two sets of breaches, first with respect to the reasonable grounds for the arrest and, second, with respect to the strip search.

[77] Crown counsel, in their candid submission, conceded that it would be difficult to not exclude the fruits of the seizure if there were not reasonable grounds for the original arrest of Mr. Sidhu. The concession is completely appropriate.

[78] The stopping and arrest of Mr. Sidhu at the side of a busy highway without the requisite grounds to do so is a very serious breach of Mr. Sidhu's rights. The power of arrest is a mighty one giving the state the authority to take away a citizen's liberty to be left alone. The power of arrest also justifies further intrusions of privacy such as a search incident to arrest. Reasonable grounds constitutes the balance struck between the individual being left alone and the right of police to enforce the law. When a citizen's liberty has been taken away without those grounds having been met, it is very serious conduct. The impact on Mr. Sidhu's *Charter*-protected interests to be left alone is equally serious. The evidence sought to be excluded is conclusive of guilt and society has a powerful interest in convicting those who engage in the hideous business of distributing drugs often to those who are made hopelessly vulnerable by their addiction. Yet, the long term impact on the administration of justice is what must be borne in mind. To disregard a critical protection of the public that their liberty only be restricted when there are reasonable grounds to do so would have a negative impact on the administration of justice in the long term.

[79] It is with little difficulty that I say that if I am right about the absence of reasonable grounds for the arrest and therefore the absence of grounds for the strip search that the evidence of the search of Mr. Sidhu be excluded.

[80] The more difficult analysis is in the event that I am wrong about the reasonable grounds for the arrest while being correct in my analysis of the strip search. To answer that issue I return to the *Grant* inquiry.

[81] The first line of that inquiry is the seriousness of the *Charter*-infringing state conduct.

[82] I have found that the police did not follow the requirements of *Golden*. Those requirements of reasonable grounds in addition to those of the arrest are clear. The rationale for those additional grounds, namely to only require a citizen endure the degrading exercise of a strip search where it is necessary to do so, is equally clear. Yet this strip search was approached as if it were routine. Cst. Smee made his mind up by the time of the pat down search. He testified that the only cases where he would not pursue a strip search are when he believed that he had located all the evidence. To accept that as the appropriate boundary for a strip search as “necessary” is to defer the grounds to the police. The cases make clear that this must not be done (*Sohi*, at para. 27; *MacKenzie*, at para. 64).

[83] Additionally, Cst. Smee obtained his authorization from Cst. Faulkner which was of such little importance that Cst. Faulkner made no note of it. Finally, no one bothered to ensure there was the required transparency by failing to complete the paperwork. The whole chronology of events exhibits a nonchalance that is contrary to the entire spirit and letter of *Golden*. That nonchalance is inconsistent with a finding of good faith on the part of the police. I find that the conduct here is a very serious infringement.

[84] The second line of inquiry is the impact on *Charter*-protected interests. In this case the interests are, first, the liberty to be left alone by the state and, second, the ability to not undergo an investigative procedure that is degrading and humiliating. It goes without saying that these are very important interests to any person. The amount of time over which those critical rights were infringed makes this anything but a fleeting impact. I find that the impact was very significant.

[85] The third line of inquiry is society's interest in an adjudication on the merits. As I have said, the evidence sought to be excluded is conclusive of the guilt of Mr. Sidhu. The offences in question are very serious involving an aspect of preying on the vulnerable in our society. Yet the long-term consequences of not protecting the rights of individuals is, in my view, much more serious, than the result in a single case.

[86] As I have concluded that the three inquiries all lead to exclusion, the balancing of interests is straightforward. I have concluded that it would bring the administration of justice into disrepute to admit the evidence of the strip search and accordingly it is excluded.

BROOKS T.C.J.