Citation: *R. v. Baglee*, 2022 YKTC 13

Date: 20220314
Docket: 19-00346A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

JONATHAN WILLIAM BAGLEE

Appearances:
Megan Seiling — Counsel for the Crown
Vincent Larochelle — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] RUDDY T.C.J. (Oral): Jonathan Baglee has entered not guilty pleas in relation to a 19-count Information. Charges include a single count of possession of cocaine for the purpose of trafficking. The remaining 18 counts involve charges for possession of firearms while prohibited, possession of prohibited firearms and prohibited devices, and storage of loaded firearms contrary to regulatory requirements. The 18 counts relate to five different firearms. Each of the items giving rise to the charges was found by the RCMP at Mr. Baglee's residence and on his property on July 30, 2019, during a warrantless search followed by a search pursuant to a warrant issued primarily on the basis of grounds obtained during the initial warrantless search. Mr. Baglee has filed a

Notice of *Charter* Application alleging breaches of ss. 8, 9, and 10(b) of the *Charter* and seeks exclusion of all evidence obtained by the police from Mr. Baglee's residence and all statements made by Mr. Baglee following his detention pursuant to s. 24(2).

Facts

[2] For context, the following is a brief outline of the facts.

[3] Earlier in July 2019, a spree killing in Northern British Columbia had led to a nationwide manhunt for two suspects. The British Columbia RCMP had received a tip suggesting the two suspects had been seen in the Yukon at a rest stop south of Jake's Corner on the Alaska Highway some time before. A request was sent to the Yukon RCMP to follow up on the tip.

[4] Just after 7:30 p.m., on July 30, 2019, Cpl. Long, the only police dog handler in the Yukon, and Cst. Miller, from the Major Crimes Unit, arrived at the rest stop, in separate vehicles, to conduct an article search using the police dog, with the intention of looking for any cast-off items that could be linked to the suspects. While the tip suggested the suspects had discarded a bag of garbage, it was understood that the garbage at the rest stop had long since been collected.

[5] Nine minutes into the search, the officers heard three relatively quick shots from what they believed to be a high-calibre rifle. While acknowledging the sound, they, nonetheless, continued in their search. Ten to 20 seconds later, they heard an additional five to six shots in much more rapid succession, described by Cst. Miller as being as fast as you can pull the trigger.

[6] After the second volley of shots, Cpl. Long and Cst. Miller decided to investigate. They got in their respective vehicles and drove back towards Whitehorse, with Cst. Miller taking the lead. They turned into the first driveway they came across, located approximately three kilometers up the Alaska Highway.

[7] Cpl. Long radioed the Operational Communications Centre ("OCC") at 7:42 p.m. to advise that he and Cst. Miller were "checking out some rapid gunfire that we heard, and we're at km 1330 Alaska Hwy, going in a long driveway north". OCC asked, "Do you want additional officers there?" Cpl. Long replied, "No, we're good now".

[8] Csts. Turner and Lightfoot were on patrol in Whitehorse when they heard Cpl. Long's radio transmission. Because of the remote location and possible involvement of firearms, Csts. Turner and Lightfoot decided to head out to the area as a precaution.

[9] Cst. Miller and Cpl. Long drove up the long, winding driveway until it opened up into a cleared area revealing a house, a detached garage or shop, dogs, and livestock. They arrived at the property at approximately 7:45 p.m. Cst. Miller parked his Suburban roughly perpendicular to the house. Cpl. Long parked his vehicle behind Cst. Miller's vehicle.

[10] Cst. Miller exited his vehicle, remaining behind the engine block. He called up to the house, identifying himself as RCMP and honked his vehicle horn. Cst. Miller noted a hand closing a curtain over one of the windows.

[11] Cpl. Long noted two vehicles parked in front of the house and contacted OCC to run the licence plates. He was advised that one vehicle was registered to Mercedes Shelley, Mr. Baglee's partner, and the other to Thomas Widrig, a friend of the family.

[12] Cst. Turner radioed to say, "I'm going to head your way, Cam", to which Cpl. Long replied, "Yeah, it felt like target practice, but definitely high capacity."

[13] A young child briefly came out on the deck, which runs along the front and left side of the house, before returning inside. Police later learned there were a total of three small children in the home.

[14] Shortly thereafter, Mercedes Shelley, came out on to the deck. Cst. Miller called to Ms. Shelley to come down to speak with him. She asked if she could get her shoes, and he agreed. Before she could do so, Cpl. Long exited his vehicle and told Cst. Miller, "I don't think this is the place". He then walked past Cst. Miller toward the house. Cst. Miller reluctantly followed.

[15] Cpl. Long spoke to Ms. Shelley on the deck, advising her that they were there in relation to gunfire they had heard. Ms. Shelley indicated that she had been firing her .22 calibre rifle. Cpl. Long said, "Ma'am, that's not true; there's no way it was a .22".

[16] From this point on, the chronology of events is somewhat unclear. The general events are set out below for convenience, but the chronology will require greater consideration in the analysis to follow, as there are potential implications in assessing both the reliability of the evidence and its impact on the alleged *Charter* breaches.

[17] Cpl. Long scanned the area and noted a large number of spent shell casings of different calibres scattered around the deck. Cst. Miller also took note of the casing and says he walked behind Cpl. Long and picked up one of the casings from what he believed to be a freshly spent .223 round. Cst. Miller held up the casing and said, “This isn’t a .22.”

[18] Mr. Baglee came out on to the deck. Cpl. Long reiterated why they were there, and Mr. Baglee also suggested that Ms. Shelley had been firing her .22 rifle. Cpl. Long indicated that he did not believe it had been a .22 rifle, explaining that he was quite familiar with several different firearms, including those that would have been fired in order to generate the many spent casings he observed.

[19] At some point during the conversation with Mr. Baglee, Ms. Shelley went into the home and retrieved a bolt action .22 calibre rifle. She handed it to Cst. Miller who made sure it was unloaded before setting it aside.

[20] Mr. Baglee then said that Ms. Shelley may have been firing the XCR .308 rifle. When asked where the .308 rifle was located, Ms. Shelley looked to Mr. Baglee. Cst. Miller suggested to her that if she had been firing the .308 rifle, she would know where it was located.

[21] Cst. Miller accompanied Ms. Shelley into the home to retrieve the .308 rifle. Ms. Shelley advised Cst. Miller that the firearms were legal. She reached into her purse to provide him with her Possession and Acquisition Licence (“PAL”). Cst. Miller set the PAL aside. He followed Ms. Shelley to the bedroom, where the .308 rifle was located on the floor on the far side of the bed. Cst. Miller ejected a live round from the chamber

and pulled the magazine out; noting the weight of the magazine suggested it held a number of rounds.

[22] Cst. Miller asked Ms. Shelley if there were any more firearms, and she pointed out a shotgun partially visible in the bedroom closet. Cst. Miller retrieved the shotgun, which he also noted to be loaded with one round in the chamber, three rounds in the tube, and additional shotgun shells in a nylon sleeve on the butt or stalk of the gun. He unloaded the shotgun and returned to the deck, taking both firearms with him.

[23] At some point over the course of these events, three things occurred, for which the chronology is particularly unclear. Thomas Widrig came out on to the deck and indicated that he had been in the back room playing video games and had not heard any shots. Mr. Baglee made an admission to Cpl. Long that he was subject to a firearms prohibition as a result of a conviction for robbery. Cpl. Long detained Mr. Baglee, placed him in handcuffs, and advised Mr. Baglee that he did not need to say anything, but that anything he did say could be used against him.

[24] While Mr. Baglee remained on the deck in cuffs, Ms. Shelley, Mr. Widrig, and the children continued to move freely about both inside and outside of the residence.

[25] When Cst. Miller returned to the deck, he provided the .308 magazine to Cpl. Long who believed it to be a prohibited device based on weight, meaning the magazine held more than the five rounds allowed by law. Cst. Miller placed the three firearms on the trampoline next to the deck.

[26] Cpl. Long decided to "clear" the house. He searched the couch in the living area for any firearms, and directed Ms. Shelley and Mr. Widrig to sit on the couch. Cst. Miller positioned himself at the door where he could observe both Mr. Baglee, cuffed and seated on a chair on the deck, and Ms. Shelley, Mr. Widrig, and three young children, all located in the living area. Cpl. Long then "cleared" the house by doing a "tactical" walk through each of the rooms, both upstairs and downstairs, identifying himself loudly along the way.

[27] Cpl. Long located a loaded .22 calibre rifle in a crib in the basement and a 12-gauge shotgun on a dresser in the master bedroom.

[28] When Cpl. Long returned, he advised Mr. Baglee of what he had found and indicated that they would be seeking a search warrant. Mr. Baglee told Cpl. Long that he would find cocaine in the shop. Mr. Baglee then asked to speak to Cpl. Long in private. Cpl. Long took Mr. Baglee into the bedroom where Mr. Baglee spoke to Cpl. Long about concerns he had for his family's safety.

[29] At 8:37 p.m., Csts. Turner and Lightfoot arrived at the residence. While Cst. Turner suggests that Cpl. Long was on the deck when they arrived, I am satisfied that he was simply mistaken on this point. All of the evidence overwhelmingly indicates that Cst. Miller, rather than Cpl. Long, was on the deck when Csts. Turner and Lightfoot arrived. Cst. Miller provided both with an overview of the circumstances. Cst. Lightfoot entered the residence where he encountered Cpl. Long who told him that Mr. Baglee was in the bedroom. Cst. Lightfoot went to the bedroom where he found Mr. Baglee. After speaking to Mr. Baglee, Cst. Lightfoot determined that Mr. Baglee did not need to

be handcuffed in front of his children as he was escorted from his home. Accordingly, Cst. Lightfoot removed the handcuffs.

[30] Cst. Lightfoot escorted Mr. Baglee out of the bedroom, allowing him to hug and say goodbye to his children along the way. Cst. Lightfoot turned Mr. Baglee over to Cst. Turner who also determined it was unnecessary to cuff Mr. Baglee in front of his children. Cst. Turner escorted Mr. Baglee out of the home, where he cuffed Mr. Baglee for transport and placed him inside the police vehicle. At 9:02 p.m., Cst. Turner formally arrested Mr. Baglee for possession of a firearm while prohibited, read him his right to counsel, and advised him of the police warning. Mr. Baglee's mother arrived to provide transportation to Ms. Shelley, Mr. Widrig, and the children. Cst. Turner allowed Mr. Baglee to speak with his mother, keeping him in sight but allowing them some privacy by moving a short distance away.

[31] Csts. Turner and Lightfoot transported Mr. Baglee to the Arrest Processing Unit, where he was ultimately provided access to counsel at 11:04 p.m. Around the same time as Csts. Turner and Lightfoot departed, Ms. Shelley, Mr. Widrig, and the children left with Mr. Baglee's mother.

[32] Cpl. Long and Cst. Miller "cleared" the garage or shop after everyone else had left, locating cocaine, firearms, and firearm parts. They then conducted a perimeter search of the property, while waiting for a search warrant to be obtained by Cst. Lightfoot.

[33] No one else was located in the buildings or elsewhere on the property.

[34] Several other RCMP members arrived to execute the search warrant some time later, and a thorough search of the property was conducted. All items seized are listed in Exhibit 3 and photographed in Exhibit 4. While the exhibit list is somewhat difficult to decipher, as are the photographs, without further explanation, it would appear that a total of nine firearms were seized, including the four others named in the Information, along with the .308 rifle. In addition to the nine firearms, there were numerous firearm parts, magazines, a silencer, and considerable ammunition located and seized. In addition to drug paraphernalia, the exhibit list references that a total of 118.83 grams of cocaine was seized.

Issues

[35] As noted, Mr. Baglee has filed a Notice of *Charter* Application alleging that the actions of the police on July 30, 2019, violated several of his *Charter* rights. The issues for determination on the *voir dire* are as follows:

1. Whether any or all of the police conduct constituting a search violated Mr. Baglee's s. 8 right to be secure against unreasonable search and seizure;

2. Whether Mr. Baglee's detention was arbitrary contrary to s. 9;

3. Whether the informational and implementational components of Mr. Baglee's right to counsel under s. 10(b) were violated; and

4. In the event Mr. Baglee is successful in establishing one or more breaches of his rights under the *Charter*, what, if any, remedy is appropriate?

Section 8

[36] For the purposes of this *voir dire*, the first issue, the s. 8 argument, relates to police conduct prior to obtaining the search warrant rather than the validity of the search warrant itself. That being said, the ruling on the *voir dire*, depending on its outcome, may well have implications for the validity of the warrant.

The Legal Framework

[37] The s. 8 analysis has three components that must be addressed:

1. Is there a reasonable expectation of privacy;

2. Is there a search and/or seizure; and

3. Is the search and/or seizure unreasonable?

Reasonable Expectation of Privacy

[38] With respect to the first component, expectation of privacy, Crown has quite properly conceded the longstanding recognition of the high expectation of privacy one has in their private residence, which has been repeatedly affirmed by the Supreme Court of Canada (see *R. v. Godoy*, [1999] 1 S.C.R. 311; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. MacDonald*, 2014 SCC 3).

Search or Seizure

[39] For the second component, I first need to determine if there has been a search and/or seizure. In this case, defence submits that much of the police conduct, from the time the officers turned onto Mr. Baglee's driveway onwards, amounts to searches in law. Specifically, defence counsel has characterized the following police actions as searches:

a. Turning to drive up the private driveway;

b. Recording and running the licence plates of vehicles parked on the property;

c. Scanning the area around the house for evidence;

d. Picking up shell casings; and

e. Entering and clearing the home and garage.

[40] The Supreme Court of Canada, in *R. v. A.M.*, 2008 SCC 19, at para. 8, held that a search, for the purposes of s. 8, "…may be defined as the state invasion of a reasonable expectation of privacy…" (see also *R. v. Wise*, [1992] S.C.R. 527, at p. 533; and *R. v. Evans*, [1996] 1 S.C.R. 8, at para. 11). Based on this definition, it is indisputable that entry into Mr. Baglee's home and garage would amount to searches under s. 8.

[41] The remaining police actions identified occurred outside of Mr. Baglee's actual house and outbuildings. However, Mr. Baglee's expectation of privacy clearly extends

to the property on which the buildings stand. In *Evans*, the Supreme Court of Canada held that a person's expectation of privacy in their home includes an expectation of privacy in the approach to their home, such as a driveway. Similarly, numerous cases have held that officers who wander around private property looking in windows, collecting garbage, or recording licence plates, are involved in what has been termed a perimeter search (see *R. v. Kokesch*, [1990] 3 S.C.R. 3; *R. v. MacAngus* (1994), 25 W.C.B. (2d) 186 (Ont. Ct. J. (Gen. Div.); *R. v. Peterson* (1994), 50 B.C.A.C. 24; *R. v. Wiley*, [1993] 3 S.C.R. 263).

[42] Thus, any state entry onto private property will constitute a search. The sole exception, as set out in *Evans*, is the existence of an implied licence to enter onto private property to approach and knock on the door with the intention of speaking to the occupants. As noted by the Supreme Court of Canada in *MacDonald*, at para. 26:

> …Doing so will not be considered an invasion of privacy constituting a search if the purpose of the police is to communicate with the occupant. But "[w]here the conduct of the police … goes beyond that which is permitted by the implied licence to knock, the implied 'conditions' of that licence have effectively been breached, and the person carrying out the unauthorized activity approaches the dwelling as an intruder" (*Evans*, at para 15). In such circumstances, the police action constitutes a "search".

[43] Applying this test, I am satisfied that all of the police conduct itemized by counsel for Mr. Baglee involved state intrusion on a reasonable expectation of privacy thereby amounting to searches for the purposes of s. 8 of the *Charter*. That being said, the conduct involves varying degrees of state intrusion, from minor to extreme. Thus, a determination of whether each of these searches was in breach of s. 8 will depend on determination of the third component, namely reasonableness.

Were the Searches Reasonable?

[44] The starting point in assessing the reasonableness of the searches is the lengthy line of cases, beginning with the 1984 decision of the Supreme Court of Canada in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, which make it clear that all warrantless searches are *prima facie* unreasonable. Furthermore, in the s. 8 analysis of a warrantless search, the onus shifts from the defendant being required to establish a *Charter* breach, on a balance of probabilities, to the Crown being required to rebut, also on a balance of probabilities, the presumption that the warrantless search is unreasonable.

[45] The legal framework for assessing the reasonableness of warrantless searches was articulated by the Supreme Court of Canada in *R. v. Collins*, [1987] 1 S.C.R. 265, at para. 23: "A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable. ..."

[46] In this case, as with many, the assessment of reasonableness turns on the first branch of the framework, namely whether the searches were authorized by law. As the only authorizing law at issue is the common law, and the common law is presumed to be reasonable, the second branch of the test does not require any analysis. With respect to the third branch, the manner in which the searches were conducted, neither defence argument nor the evidence raises any questions of unreasonableness specific to the manner in which the searches were conducted in this case.

[47] The test for determining whether a search was authorized by law was initially adopted by the Supreme Court of Canada from the British case of *R. v. Waterfield*,

[1963] 3 All E.R. 659 (C.C.A.) in *Dedman v. The Queen,* [1985] 2 S.C.R. 2. The test was reiterated by the Supreme Court of Canada in *Godoy*, at para. 12, as follows:

> The accepted test for evaluating the common law powers and duties of the police was set out in Waterfield, supra (followed by this Court in R. v. Stenning, [1970] S.C.R. 631, Knowlton v. The Queen, [1974] S.C.R. 443, and Dedman v. The Queen, [1985] 2 S.C.R. 2). If police conduct constitutes a prima facie interference with a person's liberty or property, the court must consider two questions: first, does the conduct fall within the general scope of any duty imposed by statute or recognized at common law; and second, does the conduct, albeit within the general scope of such a duty, involve an unjustifiable use of powers associated with the duty.

[48] As there is no relevant statute codifying police duties in the Yukon, the first branch of the *Waterfield* test requires consideration of police duties at common law. In *Godoy*, the Supreme Court of Canada summarized police duties at common law, quoting from *Dedman*:

> 15 In *Dedman, supra*, at pp. 11-12, this Court held that the common law duties of the police (statutorily incorporated in s. 42(3)) include the "preservation of the peace, the prevention of crime, and the protection of life and property" (emphasis added). As Finlayson J.A. noted in the Court of Appeal, the common law duties of the police have yet to be judicially circumscribed. Furthermore, the duty to protect life is a "general duty" as described by Finlayson J.A., and is thus not limited to protecting the lives of victims of crime.

[49] In *R. v. Mann*, 2004 SCC 52, the Supreme Court of Canada referenced the common law police duty to investigate crime (see para. 35).

[50] Accordingly, the first branch of the *Waterfield* test, as applied to the case at bar, requires determination of which particular police duty the police actions in this case fall

under: the duty to protect life, as asserted by the Crown, or the duty to investigate crime, as argued by the defence.

[51] Once the police duty is determined, step two of the *Waterfield* test requires consideration of "…whether the action constitutes a justifiable exercise of powers associated with the duty…" (*MacDonald*, at para. 36). The case law is clear that, while the police may have a duty, "…they are not empowered to undertake any and all action in the exercise of that duty…" (*Mann*, at para. 35).

[52] In assessing whether the police actions in this case were justifiable, Crown argues that I should equate the situation before me with a 911 call, in effect, by considering Cpl. Long and Cst. Miller to be in a situation analogous to that of a 911 caller.

[53] In *Godoy*, the leading case on police powers in relation to 911 calls, the facts involved a 911 call that had been disconnected before the caller spoke. This fell into the category of an unknown trouble call, which, by virtue of police policy, was the second highest priority call after police officer in distress calls. Police attended the residence and knocked. The accused opened the door, but denied that there was any problem. The police asked to enter to investigate, but the accused tried to close the door. The police forced entry, heard a woman crying, and found the accused's spouse in the bedroom with visible injuries. The accused was arrested for assault.

[54] The Court held that the police were acting in furtherance of their duty to protect life. In determining whether the police actions were a justifiable use of police powers, the Court noted that 911 calls are distress calls that may occur in situations where the

caller cannot, for various reasons, speak and identify themselves or the nature of the distress. At para. 22, the Court concluded as follows:

> Thus in my view, the importance of the police duty to protect life warrants and justifies a forced entry into a dwelling in order to ascertain the health and safety of a 911 caller. The public interest in maintaining an effective emergency response system is obvious and significant enough to merit some intrusion on a resident's privacy interest. However, I emphasize that the intrusion must be limited to the protection of life and safety. The police have authority to investigate the 911 call and, in particular, to locate the caller and determine his or her reasons for making the call and provide such assistance as may be required. The police authority for being on private property in response to a 911 call ends there. They do not have further permission to search premises or otherwise intrude on a resident's privacy or property. In Dedman, supra, at p. 35, Le Dain J. stated that the interference with liberty must be necessary for carrying out the police duty and it must be reasonable. A reasonable interference in circumstances such as an unknown trouble call would be to locate the 911 caller in the home. If this can be done without entering the home with force, obviously such a course of action is mandated. … [emphasis added]

[55] The difficulty with the analogy the Crown asks me to draw, is that the *Godoy* case very clearly limits the power of entry in a 911 case to the extent of locating and ensuring the safety of a 911 caller. While it has been relied on in numerous cases, including cases allowing entry for the purposes of searching for as yet unknown potential victims (see *R. v. Golub*, [1997] O.R. (3d) 743 (C.A.); *R. v. Jamieson*, 2002 BCCA 411), the *Godoy* case is largely premised on the characterization of a 911 call as an indicator of distress and the significant public interest in ensuring an appropriate emergency response to 911 calls. Indeed, Crown has provided a secondary source in the form of a British Columbia Coroner's verdict into the death of Lisa Dudley, *Dudley (Re)* (2018), 2008-0228-0360 (BC Coroners Service), which dramatically indicates the potential for tragedy in the absence of an effective response to a 911 call.

[56] This case does not involve a 911 call indicative of someone being in distress, hence it does not import the same public interest considerations related to an effective 911 response, in my view.

[57] A more analogous case would be that of the 2014 decision of the Supreme Court of Canada in *MacDonald*, in which the police responded to a noise complaint. They knocked at the door of the accused's residence and shouted. Several minutes later, the accused opened the door about 16 inches. The police officer noticed something black and shiny in the accused's right hand partially hidden behind his leg. Twice, the officer asked what the object was, but the accused did not respond. The officer pushed the door open a few more inches, the search at issue in the case. The officer then saw the object to be a handgun, leading to a forced entry and struggle to disarm the accused.

[58] The Court characterized such searches intended to respond to threats to the public or the police as "safety searches". In considering the application of the second branch of the *Waterfield* test, the Court set out the following framework:

> 36 …As this Court held in *Dedman*,
>
> > [t]he interference with liberty must be <u>necessary</u> for the carrying out of the particular police duty and it must be <u>reasonable</u>, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference. [Emphasis added; p. 35.]
>
> Thus, for the infringement to be justified, the police action must be *reasonably necessary* for the carrying out of the particular duty in light of all the circumstances (*Mann*, at para. 39; *Clayton*, at paras. 21 and 29).
>
> 37 To determine whether a safety search is reasonably necessary, and therefore justifiable, a number of factors must be weighed to balance the police duty against the liberty interest in question. These factors include:

> 1. the importance of the performance of the duty to the public good (*Mann*, at para. 39);
>
> 2. the necessity of the interference with individual liberty for the performance of the duty (*Dedman*, at p. 35; *Clayton*, at paras. 21, 26 and 31); and
>
> 3. the extent of the interference with individual liberty (*Dedman*, at p. 35).
>
> If these three factors, weighed together, lead to the conclusion that the police action was reasonably necessary, then the action in question will not constitute an "unjustifiable use" of police powers (*Dedman*, at p. 36). …

[59] The Court further expanded on the test of reasonable necessity in the context of safety searches at para. 41:

> But although I acknowledge the importance of safety searches, I must repeat that the power to carry one out is not unbridled. In my view, the principles laid down in *Mann* and reaffirmed in *Clayton* require the existence of circumstances establishing the necessity of safety searches, reasonably and objectively considered, to address an imminent threat to the safety of the public or the police. Given the high privacy interests at stake in such searches, the search will be authorized by law only if the police officer believes on reasonable grounds that his or her safety is at stake and that, as a result, it is necessary to conduct a search (*Mann*, at para. 40; see also para. 45). The legality of the search therefore turns on its reasonable, objectively verifiable necessity in the circumstances of the matter (see *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531, at para. 33). … [emphasis added]

[60] Thus, a warrantless safety search will be justifiable, and therefore reasonable, if the officer believes that the search is reasonably necessary to eliminate an imminent threat to the safety of the public or the police, and this subjective belief is objectively verifiable.

[61] Alternatively, Crown relies on exigent circumstances. As noted in *Feeney*, "…exigent circumstances arise usually where immediate action is required for the safety of the police or to secure and protect evidence of a crime…" (para. 52).

[62] When applied to the case at bar, the question of exigent circumstances does not, in my view, change the test to be applied in determining reasonableness nor offer an alternative justification in assessing reasonableness in this case. Firstly, because neither the police witnesses nor the Crown have asserted that any of the searches were necessary to prevent the destruction of evidence, the only potential exigent circumstances at issue relate to the safety of the police or public, in effect, what is at issue in assessing the reasonableness of a safety search such that the considerations under the *MacDonald* test and exigent circumstances are intertwined. Furthermore, in *MacDonald*, the Court made it clear that, "[e]ven if exigent circumstances exist, however, "safety searches" must be authorized by law". From this it appears, that if a safety search is not authorized by law, it is not saved by the presence of exigent circumstances.

[63] Thus, the s. 8 analysis in this case turns on a determination, based on the facts, of the police duty being performed and whether the police powers exercised in furtherance of that duty were reasonably necessary in relation to each of the identified searches.

Analysis

[64] Application of the law to the facts of this case first requires careful consideration of the evidence of Cpl. Long and Cst. Miller, including both credibility and reliability,

before making the factual findings necessary to determine the police duty being undertaken, the officers' subjective beliefs serving as the basis for the actions undertaken, and, finally, whether their belief was objectively verifiable on the evidence.

Cpl. Long

[65] Turning first to Cpl. Long's evidence, I had two concerns, both of which raise questions about the reliability of his evidence, particularly on finer details: his defensiveness on cross-examination and inconsistencies in his evidence.

[66] With respect to defensiveness, there were numerous examples over the day and a half of cross-examination in which Cpl. Long seemed unwilling to agree to the obvious, most often when the topic related to what I will term his foundational premise. By that I mean that much of what Cpl. Long did flowed from his firm belief that the six shots he heard must have come from either an automatic weapon or a semi-automatic weapon with a prohibited device. From what I can infer, this belief was based on both the rapidity of the shots fired and the fact that the law limits magazines for semi-automatic weapons to a maximum capacity of five bullets. Cpl. Long became very defensive to any line of questioning that called into question this foundational premise.

[67] One example of this is seen in the line of questioning around five plus one firearms, namely firearms that can shoot six bullets, with one round in the chamber and the maximum five in the magazine. One such exchange was as follows:

> Q: If I told you I had one bullet chambered in the rifle, five in the magazine, and I shot all of them, would you say that's impossible?
>
> A: No.

Q: In other words, it's perfectly legal to have a rifle capable of shooting six bullets?

A: No.

Q: If I go on Cabela's, and I look to buy a hunting rifle and it shows a capacity of five plus one,

A: Oh ok, five in the magazine, one in the chamber.

Q: So it's possible to shoot six bullets?

A: Ya, you know what, I don't have the *Criminal Code* in front of me, I don't know the exact wording of it. So…

Q: Sir, is it possible to have a bullet chambered?

A: Yes, uh, in most, well, not all firearms, not all firearms, but some you can have one chambered.

Q: It's fairly common to be able to chamber a bullet.

A: Plus your full-capacity magazine? Well, I don't know, I have several rifles that can't do that.

Q: Right, but there are a lot of rifles that can do that?

A: I'm not sure, I don't pretend to be a firearms expert.

Q: Sir, you said you're a 'gun aficionado'. If I tell you I can pull up Cabela's and find a hundred different rifles with a capacity of five plus one for hunting, you'd contest that?

A: You can pull'em up but I'm not…

Q: Do you think that's possible?

A: It's possible, for sure, I would think that should be possible.

Q: It's actually common.

A: Okay.

Q: Do you agree?

A: No, in my experience, with the rifles I have, it's not common.

[68] Following a review of examples of five plus one rifles on the Cabela's website legally available for purchase, Cpl. Long was asked, and agreed, that he was not sure whether the sound he had heard was made by an automatic or a semi-automatic weapon. He was later asked whether a five plus one semi-automatic weapon was capable of making the sound he heard, he replied:

> A: No, in my opinion, no; not a hunting rifle; a tactical carbine with a very skilled operator, maybe, that rifle you showed me there, I don't know.
>
> Q: That was not a hunting rifle, was it?
>
> A: What?
>
> Q: The one that you saw.
>
> A: I don't know what it was. And then…
>
> Q: You called it a tactical carbine, when you looked at it.
>
> A: Ya, but it is now more common in a hunting platform, especially in the United States. That is their…
>
> Q: Let me suggest to you that there's a fundamental contradiction in what you're saying right now. On the one hand you say you don't know if it's semi-automatic or automatic, on the other hand I put to you that a semi-automatic gun with a magazine capacity of six is able to produce the sound, and you deny it. That doesn't make any sense sir.
>
> A: Ya, well, it's all …
>
> Q: Sir, if you don't know whether it's semi-auto or auto, that means that a semi-automatic could make that sound.
>
> A: Honestly, I don't know, I'm confident what I heard that day was illegal, either a prohibited device or a prohibited firearm. So, if you want to say that, is it possible a semi-automatic could make that sound, I'm not an expert, I guess it could, I don't know.

[69] Cpl. Long was similarly defensive, bordering on non-responsive, when questioned about the distinction between a prohibited automatic weapon and a semi-automatic weapon with a prohibited device:

> Q: Well there's a difference between high capacity and automatic weapon.
>
> A: They're all prohibited, sir.
>
> Q: Sir, if you think you're going into the scene where someone's shooting an automatic rifle, you call it a prohibited weapon or an automatic rifle, not high-capacity.
>
> A: But it's prohibited, so whether it's high-capacity semi-automatic, high-capacity fully automatic itself is prohibited...[inaudible]
>
> Q: Agreed, but what you think you're coming to is a weapon that can fire more than five bullets.
>
> A: Prohibited.
>
> Q: Yes, you don't know whether it's automatic or semi-automatic, you're going for a weapon that can fire more than five bullets, and you say that's illegal.
>
> A: Sir [inaudible] many times I , I was in that pullout on a totally unrelated task, when I heard that gunfire, I was very confident that the source of that gunfire, whatever it was, was prohibited, not legal to possess.
>
> Q: Okay, the source of the gunfire was prohibited. There are two reasons why it might be prohibited. The first is it's a legal gun with a high-capacity magazine. Agreed?
>
> A: [inaudible]
>
> Q: And the second is, it's an illegal gun.
>
> A: The gun becomes illegal once you have an illegal prohibited device or magazine…
>
> Q: Do you disagree that there are two ways in which the device can be prohibited?
>
> A: No, you're correct.

> Q: So you agree with the following, it could have been an otherwise perfectly legal semi-automatic .308 with a high-capacity magazine?
>
> A: Well, I'm just not certain of this, and I think I said it earlier, I'm not certain if a person, maybe a trained person could fire a semi-automatic that fast, is I believe what I said…

[70] Such prolonged exchanges on seemingly simple points relating to what weapon could have made the sounds heard and the differences between prohibited weapons and legal weapons with prohibited devices were all too common during Cpl. Long's lengthy cross-examination.

[71] Furthermore, this last quoted exchange is interrelated with my second concern, namely inconsistencies, both internal and external, in Cpl. Long's evidence. The first of these inconsistencies related to Cpl. Long's evidence on what weapons could have produced the sounds heard.

[72] Early on in cross-examination, Cpl. Long was testifying in relation to the number and timing of the shots fired and he agreed that a skilled operator could fire a semi-automatic weapon almost as fast as an automatic weapon, so he believed it was either a semi-automatic weapon with a skilled operator or an automatic weapon. Some time after the aforementioned passage in which Cpl. Long seemed extremely reluctant to concede that a five plus one semi-automatic could have made the sounds heard, he was asked if the XCR .308 rifle with a five-round magazine and one in the chamber could have made the sounds he heard, and he agreed it was possible. However, much later, when asked whether the .308 rifle that was retrieved from the bedroom was a valid explanation for the sounds heard, he said that he did not believe so. When

reminded of his earlier evidence wherein he agreed the .308 rifle could have produced the sounds heard, he again agreed that it could have, with the right operator.

[73] In terms of external inconsistencies, there were a number of points on which Cpl. Long's evidence was inconsistent with that of Cst. Miller, who seemed to have a more detailed recollection. Cpl. Long testified there was no conversation between he and Cst. Miller after the first three shots were heard. Cst. Miller says Cpl. Long said, "did you hear that" and Cst. Miller replied "yep, that was three", noting that he recalled this as he has a habit of counting things. Cpl. Long testified that both put on their hard body armour at the rest stop. Cst. Miller says he did not have his hard body armour with him. Cpl. Long testified that he and Cst. Miller did have radio communication while in their vehicles and would have "been calm in dialogue", though he cannot recall what was said. Cst. Miller says he had no radio communication capability as he had not switched over repeaters as required for radio communication in that area. Cpl. Long testified that Cst. Miller went into the home with Ms. Shelley to retrieve the .22 rifle, and then gave it to Cpl. Long, advising him that it had been found loaded. Cst. Miller says that Ms. Shelley brought the .22 rifle out to him; he did not enter the home with her. Cst. Miller further says that he checked to confirm that the .22 rifle was unloaded and then set it aside. It was later confirmed that Cpl. Long indicated in his written report that Cst. Miller went with Ms. Shelley to retrieve the .308 rifle, but made no mention of Cst. Miller accompanying Ms. Shelley to get the .22 rifle.

[74] There are further inconsistencies between things noted by Cst. Miller, but seemingly overlooked or forgotten by Cpl. Long. Despite his protestations of hyper-vigilance, Cpl. Long appears not to have noticed any of the private property signs

Cst. Miller testified to "adorning" the driveway. During the conversation about the .22 rifle, Cpl. Long does not recall Cst. Miller walking behind him to pick up a .223 shell casing and saying "this is not a .22". Cpl. Long did not notice the trampoline immediately adjacent to the deck upon which Cst. Miller placed three firearms. Finally, Cpl. Long makes no mention of the shotgun Cst. Miller says he retrieved along with the .308 rifle.

[75] In addition to inconsistencies between Cpl. Long's evidence and that of Cst. Miller, Cpl. Long's evidence was inconsistent with his written report on several points, most notably the chronology of events. For example, Cpl. Long testified, in direct, that he detained Mr. Baglee when the .22 rifle was brought out of the house. On cross-examination, Cpl. Long indicated Mr. Baglee was detained after the .308 rifle was brought out and he noted the prohibited large capacity magazine. In his report, Cpl. Long's chronology of events indicates that Mr. Baglee was detained before either the .22 rifle or the .308 rifle were brought out. Similarly, in direct, Cpl. Long testified that Mr. Baglee asked to speak to Cpl. Long in private while still out on the deck but before Cpl. Long entered the house to clear it. In his report, Cpl. Long wrote that this request for a private meeting was made after Cpl. Long entered and cleared the house when he returned outside to advise Mr. Baglee they would be seeking a search warrant.

[76] While these identified frailties in Cpl. Long's evidence do not rise to the level of persuading me that his evidence is not believable, the concerns with respect to the reliability of his recollection do persuade me that his evidence must be approached with caution, particularly where precision is important, such as the timing of Mr. Baglee's detention.

Cst. Miller

[77] With respect to Cst. Miller's testimony, as noted, he appeared to have better recall on some of the specifics than Cpl. Long, though he too had some issues with the chronology of events. My concerns with Cst. Miller's evidence are also twofold: firstly, his reactions felt disproportionate to the known circumstances, and secondly, he was frequently argumentative and non-responsive in cross-examination.

[78] The first of these concerns was most notable in Cst. Miller's testimony regarding how he felt driving up the driveway. When he came to the top of the driveway where it opened up to reveal the house, Cst. Miller testified:

> A: … It's a very concerning feeling, it's an uncomfortable feeling. If, in that situation, those rounds were meant for me, and I'm not suggesting they were, but if in that instance somebody was looking to cause harm on the police, I was probably in the most vulnerable position I've ever been in in my career.

[79] On cross-examination, he said:

> A: I've never had the feeling ascending that driveway that I had, before, I haven't had it since. That was the, I can't explain to you how I feel, all I can tell you is ascending that last rise of the driveway, and no one was pointing a gun at me, there was no blood, there was no windows, all the things you said, but the sensation and the feeling that I had at that time, rising that driveway, was the worst that I've had as a Mountie.

[80] When challenged on the basis for such an extreme reaction, Cst. Miller's response was both defensive and argumentative as is seen in the following exchange:

> Q: Just because of, because of what?
>
> A: I don't, no offence sir, I don't think you can say "just". You don't know me. You don't know what I have at home, or who I have to go home

> to. You don't know what I've seen and where my brain is, specifically with the type of substantive file that I'm there to investigate. You don't know how I react to rapid gunfire. You don't know the experiences I've had as a Mountie dealing with weapons.

[81] Counsel went on to ask Cst. Miller what facts played in to his assessment, and he responded:

> A: There are zero facts, other than if somebody were to inflict or want to inflict harm on me at that time, I was in the most vulnerable position of my career. Given that I had responded to a high-calibre weapon. So, my understanding of high-calibre weapons, if someone, and it didn't turn out to be that, and I'm very glad that it wasn't that, but if someone on that property wanted to inflict harm on me, I am by myself, I am not with all of my tools, I do not have my hard body armour, I do not have my carbine, my partner is behind me, I'm driving up a hill, and if someone wants to put a round down at me, I'm at the most vulnerable.

[82] These responses feel entirely disproportionate to the circumstances, particularly when one considers that Cst. Miller conceded that it was not uncommon to hear gunshots in rural areas of the Yukon and that, when asked why the shots were of concern, he responded that it was not logical that someone was training in the area, and he would not classify that number of rounds in rapid succession as "responsible gun ownership". This is not to suggest that responding to shots fired, even in rural Yukon, does not warrant a healthy dose of caution, but Cst. Miller's state of mind when driving up the driveway was dramatically more extreme than one would expect.

[83] The only way Cst. Miller's reaction makes sense is if he were conflating the actual circumstances before him with the high-profile spree killing and manhunt that led to the assigned article search at the rest stop. Indeed, he does reference the homicide investigation as being in his mind when asked why the shots were of concern, even

though he did not believe the suspects to be in the area. Given the nature of the manhunt, it is understandable that it would be at the forefront of Cst. Miller's mind, which does help to explain the degree of his stated reaction; however, at the same time, it raises serious questions about Cst. Miller's degree of objectivity in assessing the actual circumstances before him.

[84] With respect to my second concern with Cst. Miller's evidence, namely his tendency to be argumentative and non-responsive, Cst. Miller's cross-examination was characterized by defence counsel asking the same question numerous times without Cst. Miller giving a clear answer to the question. Cst. Miller seemed to view these questions as an opportunity to simply repeat the highlights of his narrative, rather than respond to the actual question being asked. This was most notable in the responses to the repeated questions regarding what Cst. Miller believed to be the threat to officer or public safety. One such example is the exchange following Cst. Miller acknowledging that the .308 rifle provided an explanation for the shots heard. He then noted that he was not concerned about offences at that time, but about police and public safety:

> Q: What was the threat to you if you had walked away, what prevented you from walking away as far as police safety was concerned?
>
> A: Because there is deceitful people without a clear rationale, at first, as to why, that rationale didn't come out until being challenged on that version, and I don't know how the rest of it's going to unfold. I would not have felt comfortable turning and walking away from that situation.
>
> Q: Again, I'm just isolating, you said police and public safety, so I'm isolating the police safety component here a little bit,
>
> A: Okay.
>
> Q: At that point someone had walked out and given you a rifle.

A: And that was disturbing.

Q: Okay but they hadn't shot you.

A: No.

Q: So, I'm going to suggest to you that if you had said "Okay have a good day" and walk away, you wouldn't have gotten shot. Is it a fair suggestion…

A: I have no idea what would have happened to me.

Q: Do you believe you would have gotten shot if you had walked away?

A: I have no idea what would have happened if I walked away, sir.

Q: Okay, so I take it that you deny the suggestion that there wasn't any concern for police safety as far as the course of action of leaving was concerned at that point.

A: Leaving was inappropriate at that time.

Q: Because it would have jeopardized your safety.

A: The issue of safety had not been explored, examined, to a point where we knew that people were safe.

Q: Sir, I'm talking about your police officer safety.

A: I'm part of the people.

Q: Sir, but I'm talking about your police safety for now. If you had left do you think that would have been unsafe?

A: The situation had not been explored to a point where I felt comfortable, or felt that I was safe. And certainly not to a point where I felt comfortable in everyone else was safe.

Q: Okay, again, I'm asking you to explain to Her Honour, as far as you're concerned, as a police officer, explain to me why you felt it would have been unsafe for you as a police officer, at that point, when you're told about the .308, and you have that possible explanation about the sound, to disengage and leave. Tell me the factors why it made it unsafe.

A: Your Honour, the reason why I didn't leave that scene at that particular time is because we responded to multiple gunshots from a high-powered rifle. When speaking to all parties on the property, they appeared to be deceitful in their responses. At first offering up the .22

> calibre rifle as the reason for the sounds that we heard. When challenged on that, there was commentary about a .308 rifle and its whereabouts was unknown. There was another adult male that removed himself from the back room, and again telling me that he had no idea that there was shots fired on the property despite my partner and I hearing it from three kilometres away. For me to leave that scene at that time would not only jeopardize my safety, potentially, but others'. It needed to be explored in further detail.

[85] Such responses, or lack thereof, made it extremely difficult to understand just what Cst. Miller believed the threat to be, a crucial issue for determination in this case.

Police Duty

[86] In assessing the police duty at issue in the circumstances, Crown argues that the evidence supports a conclusion that Cpl. Long and Cst. Miller were acting pursuant to their duty to protect life. Defence argues that the police were acting pursuant to their duty to investigate crime.

[87] Both Cpl. Long and Cst. Miller repeatedly testified that they were, at all times, acting within the scope of their duty to ensure public safety. With respect, I am not of the view that this assertion is supported by the evidence.

[88] Both officers agreed that it was fairly common to hear gunfire in rural areas of the Yukon. Indeed, Cpl. Long testified that he resides in a rural area, and it is not uncommon for him to hear gunshots. Both officers agreed that hunting season for several large game species would open on August 1, a mere two days later. Cpl. Long agreed that it was more common to hear gunfire before hunting season, as hunters prepared their firearms for the season. Indeed, he testified that it would be unethical not to sight a firearm before embarking on a hunt.

[89] When they heard the first three shots fired from a high-powered rifle, neither officer suggested that they believed the shots raised any concern for public or officer safety. Neither officer felt there was any need for follow up or further investigation. They simply returned to their article search.

[90] If random gunfire in rural Yukon does not raise a public safety concern in and of itself, and I would certainly agree that it does not, what made the second five to six shots different? While both officers testified that it was not common to hear so many shots fired so quickly, their responses, when asked about the concern raised by the second set of shots, are telling in assessing the duty being undertaken.

[91] Cpl. Long testified that he was 100 percent confident, based on the rapidity and number of shots, that they were fired from either a prohibited automatic weapon or a weapon with a prohibited device. In other words, he was confident the firearm was illegal. He further testified that the location did not make sense as it was the middle of nowhere. It was not entirely clear to me why the location did not make sense, though Cpl. Long did testify later that he had not heard shots fired that quickly outside of training at a gun range, so presumably it is that which made the location seem odd to him.

[92] Cst. Miller testified that the second set of shots were of concern because it made no sense to him for those kinds of rounds to be put down outside a training atmosphere, and it was not logical that someone would be training in the area. He further said that he would not classify it as responsible gun ownership. When pressed on what he meant by responsible gun ownership, he testified that, in his view, it was irresponsible to

fire multiple shots in a rural area as he would argue the person was not likely in control of the weapon. This struck me as a strange conclusion when Cst. Miller, who repeated numerous times that he was not much of a gun person and only used firearms to the extent required in training as a police officer, nonetheless, testified that it was not long into his initial firearms training before he was capable of firing that many rounds that quickly.

[93] It is clear from the evidence of both officers that they believed the second shots indicated someone was committing an offence in terms of the weapon being fired and how it was being fired rather than a belief that the mere number and rapidity of shots suddenly raised a public safety concern that did not exist after the first three shots were fired.

[94] This is further confirmed by Cpl. Long's radio transmission with Cst. Turner in which he said "yeah, it felt like target shooting, but definitely high capacity".

[95] I find that the police duty being pursued at the time the officers decided to follow up on the second set of shots was clearly the duty to investigate crime, not the duty to protect life. The only factor that would make the sudden concern for public safety, between the first and second set of shots, logical was if the officers' assessment of the circumstances was influenced by the manhunt that had led them to the article search at the rest stop.

[96] Cpl. Long said the nationwide manhunt was on his mind, as it was on the minds of every officer in Canada, but he denies that the murder investigation influenced his

actions, stating that he did not believe the suspects were in the area, and he did not base his decisions on the murder investigation.

[97] The impact and influence of the murder investigation and manhunt is perhaps more noticeable in Cst. Miller's evidence. After testifying that he was concerned because the second set of shots were not logical, he said:

> A: …In all honesty, the sheer reason why I'm there is that there's three victims, for lack of better terms, in the general area where we are, although it's down in British Columbia, we have three people that have just been killed by gunfire in this area and I'm out investigating a homicide of three people by gunfire. For all I knew, although it wasn't the case obviously, the people that we were after could have been in that area. I didn't believe that was the case, but we were focussing on the fact that we were investigating firearms offences, and in this particular situation, public safety, officer safety was at the front of our brain.

[98] As already noted, the influence of the murder investigation on Cst. Miller's reactions is undeniable, notwithstanding the fact he agreed that the tip placed the suspects at the rest stop two to three weeks before the article search. Indeed, he indicated the request from the British Columbia RCMP for the article search had come in to the Whitehorse detachment some time before, but for unknown reasons had not been immediately followed up. Furthermore, the murders he refers to as being in the area, were actually in the Liard Hot Springs and Dease Lake areas of British Columbia, more than 350 km and 570 km from Jake's Corner, respectively. While the brief sightings of the two suspects in the Yukon area were extremely disquieting for all Yukoners, both officers agreed that sightings, including video footage, in the days immediately preceding the article search, placed the suspects first in Saskatchewan, then in Manitoba where the manhunt was then focussed.

[99] While the manhunt clearly impacted Cst. Miller, and likely Cpl. Long as well, the evidence simply does not support that it was at all a relevant factor in the actual circumstances before the officers on July 30, 2019. Hence, I remain satisfied that the relevant police duty at the time the officers left the rest stop and entered Mr. Baglee's driveway was the duty to investigate crime, not the duty to protect life.

[100] That being said, the police duty, at issue, can evolve as the facts evolve. Thus, it is necessary to consider whether any of the information learned by the officers can be said to have changed circumstances to the point where the duty to protect life is engaged.

[101] Much of the information learned in the course of the investigation does little to provide any basis to believe that there was a public or police safety issue. Mr. Baglee's admission that he was subject to a firearms prohibition, combined with the shots heard, is merely indicative of a potential breach of his prohibition. The plethora of scattered shells of various calibres is more indicative of frequent target shooting over time rather than a current emergency, though some of the calibres did raise the potential for the existence of prohibited weapons on the property.

[102] The closing of the curtain is potentially indicative that the occupants have something to hide, and a reasonable indicator of at least the potential for an officer safety issue. When combined with the apparent deceit of the occupants, including both Ms. Shelley and Mr. Baglee referencing the .22 rifle as the cause of the shots heard, and Mr. Widrig indicating that he had somehow not heard any shots at all, there are enough warning signs to add some legitimacy to the belief that there is a potential

concern for officer safety warranting some caution. While not overwhelming indicators of a safety concern from the perspective of hindsight, it is important to remember that police are often placed into situations of uncertainty where they must make split-second decisions based on imperfect and incomplete information. In my view, the closing of the curtain and the apparent deceit of the occupants, taken together, are sufficient to justify a shift in applicable police duty from investigation of crime to public and police safety. Hence, consideration of the reasonable necessity test set out in *MacDonald* should be from the perspective of the duty to protect life and safety, rather than the duty to investigate crime, at least from the point in time when the .22 rifle is first proffered as an explanation. Prior to that point, the applicable duty at issue would be the duty to investigate crime.

Reasonable Necessity Test

The "Duty to Investigate" Searches

[103] With respect to the application of the reasonable necessity test to the searches preceding the reference to the .22 rifle, this would include driving up the driveway, the licence plate search, scanning the property on approach, and picking up ammunition. As noted, I am satisfied the evidence, at the time of each of these searches, establishes that the police were acting pursuant to their duty to investigate crime. The question then becomes whether each of these searches, and the corresponding intrusion onto Mr. Baglee's reasonable expectation of privacy, was reasonably necessary.

[104] Before applying the *MacDonald* test, there is a threshold question that must first be addressed, namely whether Cpl. Long and Cst. Miller were legitimately engaged in

their police duty to investigate crime. This harkens back to Cpl. Long's foundational premise, namely that the shots fired must have come from either an automatic weapon or a semi-automatic weapon with a prohibited device, his grounds for believing that an offence had been committed.

[105] There was ample evidence before me to conclude that Cpl. Long's foundational premise was faulty. Firstly, the evidence does not establish that there were, in fact, six shots fired in the second grouping. Cpl. Long conceded that it was difficult to count the number of shots with accuracy as they were too fast, thus he acknowledged that there may not have been six shots fired. Furthermore, Cst. Miller testified to hearing five or six shots. This lack of certainty means I cannot find that six shots were in fact fired. Even if I were satisfied six shots had been fired, it is clear that the firing of six shots in rapid succession could have been fired from a legal five plus one semi-automatic firearm.

[106] If Cpl. Long's foundational premise has been shown to be faulty, does this, in turn, mean that Cpl. Long and Cst. Miller were not properly acting pursuant to their duty to investigate crime, as, in effect, there is a question about whether there were indeed grounds to believe an offence had been committed.

[107] In assessing reasonable grounds, a court must find that the reasonable grounds were both subjectively held and objectively reasonable. There is little doubt that Cpl. Long subjectively believed an offence had been committed. In considering whether his belief was objectively reasonable, it is important to note that this assessment is based on the totality of the circumstances and the question is whether the officer's belief

was reasonable at the time the belief was formed, not whether it is subsequently proven to be accurate (see *R. v. Wabisca*, 2018 YKTC 7, at para. 4). Though Cpl. Long's foundational premise has not proven to be accurate, I am, nonetheless, satisfied that his response in the moment was objectively reasonable.

[108] With respect to the subsequent identified searches, the test of reasonable necessity requires consideration and weighing of the three factors set out at para. 37 of *MacDonald*: the importance of the duty, the necessity of the interference with individual liberty, and the extent of the interference.

Importance of the Duty

[109] While the duty to investigate crime does not rise to the same level of importance to the public good as the duty to protect life and safety, it, nonetheless, is of measurable importance to the public good, even more so when it involves investigation into offences relating to possession and use of prohibited weapons and devices. By and large, they are prohibited for reasons of public safety, hence there is a public interest in effective enforcement of firearms laws and regulations.

Necessity of the Interference

[110] In this case, with shots having been so recently fired from what the officers believed to be a prohibited weapon or device, it was reasonable for the officers to follow up to investigate, including making inquiries about whether the weapon was, in fact, prohibited and who may have been firing it. To do so, I am satisfied that it was reasonably necessary to enter Mr. Baglee's driveway.

[111] Again, with shots so recently having been fired, I am also satisfied that the licence plate search was reasonably necessary to give some insight into who the officers may be dealing with and whether there may have been a related or concerning history with respect to firearms offences.

[112] Visually scanning the property was, in my view, simply a matter of exercising reasonable caution in responding to shots fired, which was reasonably necessary in all the circumstances. I am not satisfied the visual scans were conducted with a view to gathering evidence.

[113] With respect to the shell casings, given the number described, the officers could hardly have missed them on their approach to the door to speak to the occupants. I am not satisfied viewing them amounted to an attempt to gather evidence, and while Cst. Miller did pick one up momentarily, as it was not retained as evidence, it was no more than a technical violation at best.

Extent of the Interference

[114] Each of these preliminary searches involved relatively minimal interference with individual liberty.

[115] On balance, I am satisfied that the preliminary searches pursuant to the duty to investigate crime were reasonably necessary in all of the circumstances, and therefore, were not unreasonable searches in violation of s. 8 of the *Charter*.

The "Duty to Protect Life and Safety" Searches

[116] The searches post-dating the mention of the .22 rifle that I have identified as being pursuant to the duty to protect life and safety include Cst. Miller's entry into the house to retrieve the .308 rifle, Cpl. Long's entry into the house to clear it, and both officers entering into the garage to clear it.

[117] In applying the test of reasonable necessity, again I must consider and weigh the three factors enumerated in *MacDonald*.

Importance of the Duty

[118] In considering this factor, I would echo the comments of the Supreme Court of Canada in *MacDonald*, wherein they stated the following:

> 39 …
>
> 1. …No one can reasonably dispute that the duty to protect life and safety is of the utmost importance to the public good and that, in some circumstances, some interference with individual liberty is necessary to carry out that duty.
>
> …

Necessity of the Interference

[119] Consideration of this factor is really the crux of the s. 8 analysis in this case. As already noted, the reasonable necessity test set out in *MacDonald* requires objectively verifiable circumstances establishing the necessity of a search to address an imminent threat to the safety of the public or the police.

[120] In this case, the information the officers had prior to Cst. Miller entering the home was that shots had been fired; they had reason to believe there were weapons in the home, based on both the shots fired and the shell casings, including potentially prohibited weapons or devices; and they believed that the occupants were being deceitful about whether a weapon had been fired, what weapon had been fired, and who had fired it.

[121] Once told about the .308 rifle, Cst. Miller chose to follow Ms. Shelley into the home to retrieve the firearm. When asked if he accompanied Ms. Shelley because he believed she would shoot him, Cst. Miller replied, “it’s because I am never, in any situation, going to allow someone to get a gun and come back to me with it”. He was asked if he told her to stop when she went to go get the .308 rifle, and he replied, “No, because I was going with her to collect the firearm. I was supervising that situation”.

[122] In explaining his reasons for entering the home to get the .308 rifle, Cst. Miller did not articulate what specific threat he believed there to be. This is consistent with the passage of his testimony quoted at length earlier in which he was pressed to articulate what the threat was, but he simply kept repeating that shots had been fired, firearms had not been accounted for, and he believed the occupants were being deceitful.

[123] For his part, Cpl. Long says he entered the home to clear it because he didn’t know who else may be inside or if anyone was injured. He says he decided to clear the house to establish a level of safety. He too did not articulate what he believed to be the imminent threat beyond the possibility of someone maybe being injured inside.

[124] In my view, the totality of the circumstances simply does not support the existence of objectively verifiable grounds to believe there was any imminent threat to officer or public safety or anyone in distress inside the home.

[125] Again, both officers agreed that it was not unusual to hear shots fired in rural Yukon particularly around hunting season. Both agreed that the shots they heard were outside, not inside, the home. The presence of numerous shells outside, both fresh and weathered, indicated that shooting, likely target shooting, was a common occurrence on the property. Both officers agreed that they never observed any blood or injuries.

[126] Both officers agreed that the occupants were largely cooperative. Though Ms. Shelley and Mr. Widrig did not always follow instructions, no one was hostile. No one did or said anything remotely threatening, even though Ms. Shelley and Mr. Widrig were described as freely going in and out of the house. The one time Ms. Shelley did access a weapon inside of the home, the .22 rifle, she brought it outside and properly handed it to Cst. Miller without issue.

[127] While the occupants made a couple of statements believed to be deceitful, Mr. Baglee was otherwise honest to a fault, including making a number of statements against interest seemingly without prompting.

[128] In addition, several of the actions or non-actions of the officers were not consistent with officers who believed there to be an imminent threat. Cpl. Long declined back up for what he said felt like target practice. Cst. Miller indicated that if he had believed he would be shot, he would have drawn his weapon or he would have called the Emergency Response Team. Even believing there to be firearms, potentially

prohibited firearms or devices in the home, Cst. Miller had no problem agreeing that Ms. Shelley could go back into the home to get her shoes. Neither officer took steps to prevent Ms. Shelley, Mr. Widrig, or the children from moving freely in and about the home. Cst. Miller made no move to stop Ms. Shelley from reaching into her purse to get her PAL.

[129] This is not a case like *Godoy* in which there was a 911 call indicative of someone inside the home being in distress. This is not a case like *Jamieson* in which one individual coming out of the home had been badly injured and another was missing and possibly inside the home. This is not a case like *Golub* in which the respondent accused had made threats to harm people while in possession of a gun and, when asked if anyone else was in the residence, had replied, equivocally, he “didn’t think so”. This is not a case like *MacDonald* in which the accused had what appeared to be a weapon in his hand, but refused to say what it was.

[130] The circumstances of this case simply do not indicate there was any reason to believe there was an imminent threat to the officers or to anyone else that made entry into the home reasonably necessary for the purposes of addressing such a threat. Any perception of a safety issue on the part of the officers did not amount to any more than vague feelings unsupported by the objective evidence. As noted in *MacDonald*:

> 41 … As the Court stated in *Mann*, a search cannot be justified on the basis of a vague concern for safety. Rather, for a safety search to be lawful, the officer must act on "reasonable and specific inferences drawn from the known facts of the situation" (*Mann*, at para. 41). [emphasis added]

Extent of the Interference

[131] In this case, the extent of intrusion onto Mr. Baglee's reasonable expectation of privacy was significant. It went well beyond pushing a door open wider as in *MacDonald*, or entering into a home only to the extent required to locate the 911 caller as in *Godoy*. In this case, the officers between them entered every room in Mr. Baglee's home and went through his garage in its entirety. Having concluded that there was no objectively verifiable imminent threat, it was not reasonably necessary to enter Mr. Baglee's home and garage, without a warrant, at all, let alone to the extent that was done in this case. The officers had other alternatives. Once they became aware of Mr. Baglee's prohibition and the shell casings denoting the potential presence of prohibited weapons on the property, they could and should have sought judicial authorization to enter the home and garage.

[132] In the result, I am not satisfied that the warrantless searches of Mr. Baglee's home and garage were reasonably necessary, hence I find that entry into Mr. Baglee's home and garage amounted to unreasonable searches in violation of s. 8 of the *Charter*.

Section 9

[133] Turning to s. 9 of the *Charter*, the Supreme Court of Canada, in *Mann*, recognized a police power to detain an individual for investigative purposes provided the following guidelines are met:

> 34 … The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's

> suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the *Waterfield* test.

[134] In the case at bar, Cpl. Long indicated he made the decision to detain Mr. Baglee for potential firearms offences within five minutes of Cpl. Long's arrival, which would place the time of detention at 7:50 p.m. I am satisfied, on the evidence, that the shots fired, the shell casings, and Mr. Baglee's admission that he was subject to a firearms prohibition are enough to meet the fairly low threshold of reasonable suspicion.

[135] In determining whether detention was reasonably necessary, however, I note that Cpl. Long, when asked his reasons for detaining Mr. Baglee, said that he was trying to get a little control over what was happening, piece by piece, and Mr. Baglee was one of those pieces. If handcuffed, the risk he posed was, in Cpl. Long's view, somewhat mitigated. This suggests that the detention, in particular the use of physical restraints, was done for safety purposes.

[136] However, the evidence suggested that Mr. Baglee did not actually pose a risk. In fact, he seems to have been cooperative throughout. Cst. Miller indicated that Mr. Baglee was the consummate gentleman, and that he was the only one of the adults that was following directions. Csts. Turner and Lightfoot both felt that Mr. Baglee's demeanour was sufficiently cooperative that he need not continue to be handcuffed in front of his children.

[137] The second issue of concern is that of the duration of the detention. In *Mann*, the Court stressed that investigative detentions should be brief in duration (see para. 45).

[138] In *R. v. Barclay*, 2018 ONCA 114, the Ontario Court of Appeal noted at para. 30:

> The word "brief" is descriptive and not quantitative. It describes a range of time and not a precise time limit. The range, however, has temporal limits and cannot expand indefinitely to accommodate any length of time required by the police to reasonably and expeditiously carry out a police investigation.

[139] The Court went on to consider the factors relevant to an assessment of whether an investigative detention is or is not brief. These included the intrusiveness of the detention, including the use of handcuffs. The Court held "…[t]he more intrusive the detention is to the suspect's liberty interest, the more closely its duration will be scrutinized" (para. 31). In this case, Mr. Baglee was detained, including the use of physical restraints, for over an hour.

[140] Other factors identified in *Barclay* include any immediate public or individual safety concerns and the ability of the police to effectively carry out the investigation without continuing the detention of the suspect. As Cpl. Long's rationale for cuffing and detaining Mr. Baglee to allow them to investigate appeared based on security concerns, these two factors are intertwined in this case.

[141] Based on Mr. Baglee's apparent cooperation throughout and my earlier findings that the evidence simply did not objectively support a conclusion that there was any imminent threat to police or public safety, I fail to see why Mr. Baglee needed to be detained in physical restraints for such an extended period of time. In other words,

even if the initial detention and use of restraints was reasonable at the outset, continued detention in handcuffs beyond the first few minutes of gaining control over the scene was not reasonably necessary in all the circumstances. Hence, I am satisfied that his ongoing detention was arbitrary contrary to s. 9 of the *Charter*.

Section 10(b)

[142] Turning to the allegation of a breach of Mr. Baglee's s. 10(b) rights, the right to counsel, includes both informational and implementation components. The informational component requires an accused person to be advised of their right to counsel. Even though the reference to "without delay" is included in the first half of the clause in relation to retaining and instructing counsel, s. 10(b) has long been interpreted as requiring that an accused also be informed of their right to counsel without delay.

[143] In *R. v. Suberu*, 2009 SCC 33, at para. 2, the Supreme Court of Canada summarized their findings with respect to the timing of the informational component as it relates to investigative detentions as follows:

> The specific issue raised in this case is whether the police duty to inform an individual of his or her s. 10(b) *Charter* right to retain and instruct counsel is triggered at the outset of an investigative detention -- a question left open in *R. v. Mann,* 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 22. It is our view that this question must be answered in the affirmative. The concerns regarding compelled self-incrimination and the interference with liberty that s. 10(b) seeks to address are present as soon as a detention is effected. Therefore, from the moment an individual is detained, s. 10(b) is engaged and, as the words of the provision dictate, the police have the obligation to inform the detainee of his or her right to counsel "without delay". The immediacy of this obligation is only subject to concerns for officer or public safety, or to reasonable limitations that are prescribed by law and justified under s. 1 of the *Charter*.

[144] In *R. v. Debot*, [1989] 2 S.C.R. 1140, the Supreme Court of Canada made the following comments at para. 42 about exceptions to the “without delay” requirement based on officer safety:

> Section 10(b) also instructs the police to inform a detainee of his or her rights to counsel "without delay". As I have stated elsewhere, the phrase "without delay" does not permit of internal qualification: *R. v. Strachan; R. v. Simmons; R. v. Jacoy*. As I pointed out in *R. v. Jacoy* and *R. v. Strachan*, the phrase does not mean "at the earliest possible convenience" or "after police 'get matters under control'", or even "without *reasonable* delay"; to which I add here that "without delay" likewise does not mean "after police have had a chance to search the suspect". In *R. v. Strachan*, I suggested at p. 1013 that there may be "situations in which the police for their own safety have to act in the heat of the moment to subdue the suspect and may be excused for not pausing to advise the suspect of his rights and permit him to exercise them ...." See also *R. v. Manninen*, [1987] 1 S.C.R. 1233. In my view, time spent in legitimate self-protection is not an example of the "delay" which has to be justified within a s. 10(b) analysis. The police are not deliberately forestalling advising a suspect of his or her s. 10(b) rights when they could be going ahead. They are not expected to go ahead with undue risk to their own lives or safety. …

[145] In *R. v. La*, 2018 ONCA 830, the Ontario Court of Appeal held that concerns with respect to safety must be “…circumstantially concrete. General or theoretical concern for officer safety and destruction of evidence will not justify a suspension of the right to counsel…” (para. 39).

[146] In the case at bar, Mr. Baglee was detained and handcuffed by 7:50 p.m. He was not advised of his s. 10(b) rights at that time. Indeed, he was not so advised until he was formally arrested by Cst. Turner at 9:02 p.m., a delay of one hour and 12 minutes. For reasons already stated, I am not satisfied that there were any “circumstantially concrete” safety concerns that would have justified a delay in advising

Mr. Baglee of his right to counsel, a clear breach of the informational component of s. 10(b).

[147] With respect to the implementational component, the evidence suggested that there was available cell phone coverage on the property. Ms. Shelley was able to call her mother-in-law to ask for a ride, and Cst. Miller made a call either to Cst. Turner or to OCC on his own cell phone. Notwithstanding this, no thought was given to whether Mr. Baglee could or should be given an opportunity to contact counsel and yet, over the period of his detention, Mr. Baglee was asked questions by the officers and made several statements against interest without benefit of counsel.

[148] Defence has clearly established a breach of Mr. Baglee's s. 10(b) rights.

Section 24(2)

[149] Having determined that there were breaches contrary to ss. 8, 9, and 10(b) of the *Charter*, the remaining question to be determined is that of appropriate remedy pursuant to s. 24(2). As noted, defence seeks exclusion of all statements made by Mr. Baglee and all evidence obtained as a result of the warrantless searches of Mr. Baglee's home and garage.

[150] The test for exclusion set out by the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32, requires consideration of three factors:

1. The seriousness of the *Charter*-infringing conduct;

2. The impact on the *Charter*-protected interests of the accused; and

3. Society's interest in adjudication on the merits.

[151] The three factors must be weighed in determining whether admission of the evidence would bring the administration of justice into disrepute.

Seriousness of the Charter-infringing Conduct

[152] With respect to the first branch of the test, the Supreme Court of Canada in *Grant* articulated the first of the three factors to be considered as follows:

> 72 The first line of inquiry relevant to the s. 24(2) analysis requires a court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct. 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.

[153] In applying this branch of the test, the Crown argues that I should find it to be a draw on the basis that the officers' subjective beliefs regarding their concern for public and officer safety mitigate the degree of severity of the state conduct; though Crown does concede that this argument only makes sense if I find that the officers' subjective beliefs were close to the line of objective reasonableness.

[154] In my view, this was not a close call. Rather, the officers allowed an unrelated investigation to influence their actions and reactions to a relatively common occurrence in the Yukon to the point where there was an almost complete disregard of *Charter* norms resulting in multiple breaches. Application of the first branch of the test weighs in favour of exclusion. To conclude otherwise, would essentially give the police licence to

enter a home without a warrant at any time they believe firearms to be inside, which is not uncommon in the Yukon.

Impact on the Charter Impacted Interests of the Accused

[155] With respect to this second line of inquiry, the Supreme Court stated in *Grant*, at para. 78:

> … [A]n unreasonable search contrary to s. 8 of the *Charter* may impact on the protected interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not.

[156] As Crown quite properly concedes, consideration of this factor clearly weighs in favour of exclusion. The breaches in this case were neither transient nor trifling. The breach of s. 8 involved a significant intrusion into Mr. Baglee's high expectation of privacy in his own home. The use of handcuffs in front of Mr. Baglee's three small children impacted his human dignity. Finally, the ongoing questioning of Mr. Baglee while detained without benefit of counsel led to incriminating statements impacting his criminal jeopardy.

Society's Interest in Adjudication on the Merits

[157] As noted in *R. v. Harrison*, 2009 SCC 34, "[a]t this stage, the court considers factors such as the reliability of the evidence and its importance to the Crown's case" (para. 33).

[158] In the case at bar, the drugs and firearms obtained as a result of the *Charter*-infringing search are obviously highly reliable real evidence, and, as is usual in cases of

this nature, they are crucial to the successful prosecution of the Crown's case against Mr. Baglee. In addition, as in *Harrison*, "…[t]he evidence cannot be said to operate unfairly having regard to the truth-seeking function of the trial…" (para. 34).

[159] The third branch of the test militates in favour of inclusion.

[160] A balancing of the three *Grant* factors, in my view, would support the remedy of exclusion. In particular, I am satisfied that the dominant factor to be considered in this case is the seriousness of the combined breaches on Mr. Baglee's *Charter*-protected interests. Admission of evidence obtained as a result of such a profound failure to respect and comply with *Charter* norms would, in my view, bring the administration of justice into disrepute.

[161] With respect to the impact of this determination on admissibility of the evidence, I conclude that any physical evidence obtained as a result of the warrantless searches from the point of Cst. Miller's entry into the home onwards should be excluded. With respect to the statements of the accused, Mr. Baglee's reference to Ms. Shelley firing the .22 rifle and his admission that he was subject to a firearms prohibition, both of which I am satisfied were uttered prior to detention, are admissible, but any statements made post-detention are excluded.

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RUDDY T.C.J.