Citation: *R. v. 16142 Yukon Inc.,* 2023 YKTC 34

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Docket: 21-10406
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IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

16142 YUKON INC. o/a NORTHERN ENVIRO SERVICES and KERRY PETERS

Appearances:
Ludovic Gouaillier — Counsel for the Crown
Kerry Peters — Appearing on his own behalf and for 16142 Yukon Inc.

RULING ON *CHARTER* APPLICATION

[1] The matter before me involves alleged violations of the *Environment Act,* RSY 2002, c. 76, (the "*Act*"), and of the *Special Waste Regulations*, O.I.C. 1995/047. The defendants are 16142 Yukon Inc., which carries on business using the name Northern Environmental Services ("NES"), and Kerry Peters.

[2] NES and Mr. Peters seek the exclusion of certain evidence pursuant to s. 24(2) of the *Charter of Rights and Freedoms* (the "*Charter*") for violations contrary to s. 8 of the *Charter*. There were two searches determined to breach the s. 8 *Charter* rights of the applicants:

1. A search on or about October 16, 2020, of the Centennial Property conducted without a warrant; and
2. A search of the Centennial Property and of the 10th Street Property on December 9, 2020, pursuant to a search warrant issued under s. 154(1) of the *Act*.

[3] The *voir dire* for each search proceeded separately as the items seized during the warrantless search were included in the Information to Obtain ("ITO") for the search warrant. In *R. v. 16142 Yukon Inc*., 2023 YKTC 4 ("first *voir dire*"), I concluded that the October 16, 2020 warrantless search of the Centennial Property was unreasonable and violated s. 8 of the *Charter*. In *R. v. 16142 Yukon Inc.,* 2023 YKTC 13, ("second *voir dire*"), I concluded that the ITO for the warrant authorizing the search of the Centennial Property and of the 10th Street Property on December 9, 2020, was invalid and the search violated s. 8 of the *Charter*.

[4] Following the decision on the second *voir dire*, the parties made submissions regarding the admissibility of the evidence pursuant to s. 24(2) of the *Charter*, which states:

> 24(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter,* the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[5] The test to be applied when considering the admissibility of evidence under this section was set out by the Supreme Court of Canada in *R. v. Grant*, 2009 2 SCC. 32, and summarized at para. 71:

> 71 A review of the authorities suggests that whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s. 24(2) determination as enunciated in *Collins* and subsequent jurisprudence.

[6] I will consider each of the three lines of inquiry individually as I assess and balance the effect of admitting the evidence on society's confidence in the justice system.

Seriousness of the *Charter*-Infringing State Conduct

[7] The Court in *Grant* expanded on this line of inquiry at paras. 74 and 75:

> 74 State conduct resulting in *Charter* violations varies in seriousness. At one end of the spectrum, admission of evidence obtained through inadvertent or minor violations of the *Charter* may minimally undermine public confidence in the rule of law. At the other end of the spectrum, admitting evidence obtained through a wilful or reckless disregard of

> *Charter* rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute.
>
> 75 Extenuating circumstances, such as the need to prevent the disappearance of evidence, may attenuate the seriousness of police conduct that results in a Charter breach: *R. v. Silveira*, [1995] 2 S.C.R. 297, per Cory J. "Good faith" on the part of the police will also reduce the need for the court to disassociate itself from the police conduct. However, ignorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith: *R. v. Genest*, [1989] 1 S.C.R. 59, at p. 87, per *Dickson* C.J.; *R. v. Kokesch*, [1990] 3 S.C.R. 3, at pp. 32-33, per Sopinka J.; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 59. Wilful or flagrant disregard of the *Charter* by those very persons who are charged with upholding the right in question may require that the court dissociate itself from such conduct. It follows that deliberate police conduct in violation of established *Charter* standards tends to support exclusion of the evidence. It should also be kept in mind that for every *Charter* breach that comes before the courts, many others may go unidentified and unredressed because they did not turn up relevant evidence leading to a criminal charge. In recognition of the need for courts to distance themselves from this behaviour, therefore, evidence that the *Charter*-infringing conduct was part of a pattern of abuse tends to support exclusion.

[8] I consider the state conduct here to have been very serious. The conduct of the senior officer involved in the warrantless search showed a deliberate disregard for the *Charter*. He holds the position of Detective Sergeant and his primary responsibility as a Conservation Officer is to conduct inspections and investigations in relation to several pieces of legislation. Despite his seniority and experience, the following determinations regarding his actions are set out in the first *voir dire* decision:

- he denied being in charge of the warrantless search which was clearly contradicted in the evidence of his colleagues;

- he denied any resistance to the search from the property owner in circumstances where there was clear resistance;

- he minimized what he was able to observe of the Centennial Property from the neighbouring Department of Environment Property;

- he incorrectly testified that the decision to conduct the warrantless search was based on observations made during their inspection of the Land Treatment Facility Property;

- he proceeded with the warrantless search after speaking to legal counsel representing NES and Kerry Peters, contacted after objections were made to the proposed search;

- he led the warrantless search in contradiction of statutorily mandated policy, the *Enforcement & Compliance Policy For The Environment Act*, January 2007, issued by the Department of Environment, Government of Yukon, which sets out reasonable restrictions on the ability to enter a place without consent and to seize evidence without a warrant;

- he proceeded based on his own flawed interpretation of the legislation, despite the objections on behalf od NES and Kerry Peters, when there was no urgency preventing him from pausing and seeking guidance; and

- he led a full search of the property, including the seizing of samples and search of a building on the property, despite stating earlier to his colleagues that, if there was any evidence of a violation, they would cease operations and leave the property.

[9] It is also important to note that there was no urgency on the part of the Department of Environment to investigate the operations on the Centennial Property. The following excerpt is from para. 26 of the first *voir dire* decision:

> CO Donovan informed his colleagues that through the spring and summer months of that year, in hot weather, he could detect the smell of used motor oil coming from the Centennial Property. CO Donovan testified that these observations started in March or April of that year, his first spring residing in Watson Lake, and that he was familiar with the smell of used motor oil because of his exposure to it in a previous occupation as a shop hand in a mechanical shop where oil changes on motor vehicles were regularly conducted. He further testified that he relayed his observations to DCO Brodhagen at the time. He is not aware of what DCO Brodhagen did with the information after he reported it.

[10] DCO Brodhagen was CO Donovan's supervisor at the time of the reporting. The Crown did not present any information regarding the actions taken by DCO Brodhagen or CO Donovan in relation to the Centennial Property after the initial observations and reporting. It would appear that there were no further observations or investigative steps taken until the warrantless search months after the report.

[11] This same officer authored the subsequent ITO for the search warrant. The second *voir dire* decision sets out concerns with the failure of the officer to include clearly relevant information in the ITO, as well as writing the ITO in a manner that was unclear and misleading. Crown counsel urged the Court not to be too critical of the ITO

given that the officer had the real evidence from the warrantless search to support the application and the excisions made to the ITO would be expected to reveal problems. I disagree, as the ITO did not set out a clear picture of the investigation, or lack thereof, and, as a result, was written in a manner that was careless and misleading to the authorizing judge. I would not characterize this as a technical breach, but rather conduct which demonstrated at least a reckless disregard for *Charter* rights and therefore more serious state conduct.

[12] I find that the deliberate misconduct of the officer strongly supports the exclusion of evidence.

Impact on the Charter Protected Interests of the Accused

[13] The Court in *Grant* expanded on this line of inquiry at para. 76:

> 76 This inquiry focusses on the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a Charter breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute.

[14] The Court provides the following guidance that relates to s. 8 *Charter* breaches at para. 78:

> 78 Similarly, an 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.

[15] In the first *voir dire*, I found that the applicants held a reasonable expectation of privacy in the commercial property. In doing so, I referenced that nature of the property at para. 34 as follows:

> The evidence before the Court regarding the Centennial Property was that the premises, while used by NES, were not a public facing business. The property was not, at that time, subject to any permits or authorizations that would trigger inspections by Department of Environment officials, which would reduce the expectation of privacy. While the activity on the property appeared to be the operation of a mechanical shop for the company vehicles which may somewhat diminish the expectation of privacy, I find that NES and Kerry Peters did have a reasonable expectation of privacy with respect to the Centennial Property.

[16] While there was a reasonable expectation of privacy in the property on the part of the applicants, I do not find that the search in question intruded on an area in which the applicants reasonably enjoyed a high expectation of privacy or that it demeaned their dignity.

[17] I find that this factor moderately supports the inclusion of evidence.

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

[18] The Court in *Grant* expanded on this line of inquiry at paras. 79-81:

> 79 Society generally expects that a criminal allegation will be adjudicated on its merits. Accordingly, the third line of inquiry relevant to the s. 24(2) analysis asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. This inquiry reflects society's "collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law": *R. v. Askov*, [1990] 2 S.C.R. 1199, at pp. 1219-20. Thus the Court suggested in *Collins* that a judge on a s. 24(2) application should

> consider not only the negative impact of admission of the evidence on the repute of the administration of justice, but the impact of failing to admit the evidence.
>
> 80 The concern for truth-seeking is only one of the considerations under a s. 24(2) application. The view that reliable evidence is admissible regardless of how it was obtained (see *R. v. Wray*, [1971] S.C.R. 272) is inconsistent with the Charter's affirmation of rights. More specifically, it is inconsistent with the wording of s. 24(2), which mandates a broad inquiry into all the circumstances, not just the reliability of the evidence.
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> 81 This said, public interest in truth-finding remains a relevant consideration under the s. 24(2) analysis. The reliability of the evidence is an important factor in this line of inquiry. If a breach (such as one that effectively compels the suspect to talk) undermines the reliability of the evidence, this points in the direction of exclusion of the evidence. The admission of unreliable evidence serves neither the accused's interest in a fair trial nor the public interest in uncovering the truth. Conversely, exclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute.

[19] The evidence in question includes samples taken from the property and subsequently tested. The evidence is reliable as well as being essential for the prosecution.

[20] As is often the case with real evidence, I find that this factor supports the inclusion of evidence.

Conclusion

[21] The Supreme Court of Canada addressed the balancing of the three *Grant* factors in *R. v. Morelli*, 2010 SCC 8, at para. 108:

> 108 In balancing these considerations, we are required by *Grant* to bear in mind the long-term and prospective repute of the administration of

> justice, focussing less on the particular case than on the impact over time of admitting the evidence obtained by infringement of the constitutionally protected rights of the accused.

[22] The Court in *Morelli* continued at paras. 110 and 111:

> 110 Justice is blind in the sense that it pays no heed to the social status or personal characteristics of the litigants. But justice receives a black eye when it turns a blind eye to unconstitutional searches and seizures as a result of unacceptable police conduct or practices.
>
> 111 The public must have confidence that invasions of privacy are justified, in advance, by a genuine showing of probable cause. To admit the evidence in this case and similar cases in the future would undermine that confidence in the long term.

[23] There was a clear lack of investigative effort on the part of Department of Environment officials, as well as the senior officer in this case. The Centennial Property is located immediately adjacent to the Department of Environment property in Watson Lake, and there is a complete dearth of recorded observations and investigative efforts to determine what activities were taking place on the property that were of concern. The lack of action on the part of the Department of Environment that led to the serious *Charter*-infringing state conduct militates significantly in favour of the exclusion of evidence in this case.

[24] I am satisfied that admitting the illegally obtained evidence in this case would bring the administration of justice into disrepute and that the evidence obtained from both the October 16, 2020 and the December 9, 2020 searches must be excluded.

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PHELPS T.C.J.